

4
No. 10,073

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WESTERN-KNAPP ENGINEERING Co.

(a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate of
Jumbo Consolidated Mining Company
(a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

ARTHUR P. SHAPRO,

Russ Building, San Francisco,

Attorney for Appellant.

HAROLD A. BLOCK,

Monadnock Building, San Francisco,

Of Counsel.

FILED

MAY 29 1942

PAUL P. O'BRIEN,

CLERK

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No. 10,073

IN THE
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WESTERN-KNAPP ENGINEERING CO.

(a corporation),

Appellant,

VS.

O. T. GILBANK, Trustee of the Estate of
Jumbo Consolidated Mining Company
(a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

I.

THERE IS ONLY ONE POINT INVOLVED IN THIS APPEAL, AND THAT IS WHETHER THE BANKRUPT-BUYER (A FOREIGN CORPORATION) WAS A "RESIDENT" OF THE STATE OF CALIFORNIA WITHIN THE MEANING OF SECTION 2980 AND RELATED PROVISIONS OF THE CALIFORNIA CIVIL CODE SO AS TO REQUIRE THE RECORDING OF THE CONTRACT OF CONDITIONAL SALE IN LOS ANGELES COUNTY.

(A) THERE IS NO EVIDENTIARY PROBLEM INVOLVED.

The appellant herein has pointed out (Brief for Appellee, p. 4) that we have specified *five* errors in support of our appeal, and that *four* of these are based

upon the proposition that the evidence presented to the Referee was not sufficient to justify the findings of fact and conclusions of law and order of the Referee.

So far as the actual *facts* are concerned, we have no quarrel with the Referee's summary of the evidence. We do claim, however, that, based upon that evidence, the Referee's conclusion that the bankrupt-buyer was a "resident" of the State of California at the time of the recordation of the Contract of Conditional Sale, is entirely unsupported.

In other words the evidence shows, without dispute, that the bankrupt-buyer was a *foreign* corporation. As such, we contend that no other evidence contained in the record can show that it is a "resident" of the State of California as that word is used in Section 2980 of the Civil Code and its related sections.

(B) THE PROBLEM PRESENTED IS STRICTLY A LEGAL PROBLEM.

The issue involved in this case is squarely joined on the proposition of whether a foreign corporation, licensed to do business in this state, is a "resident" or "non-resident" within the meaning of California Civil Code Section 2980. Appellee contends that the bankrupt-buyer was a "resident"; we contend that said bankrupt-buyer was a "non-resident".

The evidence relating to "residence" shows only the following factors:

(a) *The bankrupt is a corporation duly organized and existing under and by virtue of the State of*

Nevada, and at all times since September 1, 1937, has been qualified to do business, *and has done and carried on business*, in the State of California. (T. R. p. 79.)

(b) The Articles of Incorporation provide that the principal office of the corporation in Nevada is in the City of Reno, "but that this corporation may maintain an office or *offices* in such other place or *places*, *within or without* the State of Nevada, as may from time to time be designated by the Board of Directors or by the By-Laws of this corporation and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, *outside* the State of Nevada, the same as though conducted in Nevada." (T. R. pp. 79-80.)

(c) Except for the organizational meeting held at Reno, there have been five other directors' meetings, all of which have been held in the County of Los Angeles. (T. R. pp. 80-81.)

(d) The bankrupt is qualified to do business in California and has designated the County of Los Angeles as the "location and address of the *principal office* of said corporation *within the State of California*" as required by Civil Code Section 405. (T. R. pp. 81-82.)

(e) All the books and records of the corporation have always been kept in Los Angeles County, except those required by the laws of Nevada to be kept in Reno. (T. R. p. 82.)

The above mentioned points are the only facts in the record upon which the Referee could base his findings "that said purported contracts of conditional sale and said purported conveyances are fraudulent and therefore void as against the trustee in bankruptcy herein". (Finding No. 13; T. R. p. 94.)

The problem, therefore, is really a legal one despite the fact that it does arise from what we claim to be a misapplication of the above-enumerated evidentiary factors.

**(C) APPELLEE HAS FAILED TO QUOTE THE PERTINENT PARTS
OF CALIFORNIA CIVIL CODE SECTION 2980.**

On Pages 9-10 of the Brief for Appellee, the appellee has quoted *only* that portion of California Civil Code Section 2980 which has to do with the requirements of recordation as far as "*residents*" are concerned. On page 5 of our Opening Brief we have quoted all portions of the code section having to do with the requirements for recordation where the buyer is (a) a "*resident*", or (b) "in case the buyer is a '*non-resident*' of this State". Since the sole issue in this case is whether or not the bankrupt-buyer was a "*resident*" or a "*non-resident*" within the meaning of the code section, we believe the recordation requirements for *both* of such classes of persons should be presented to the Court.

II.

EVEN IF BANKRUPT-BUYER CONDUCTS "EVERY SUBSTANTIAL FUNCTION AND ACTIVITY IN THE STATE OF CALIFORNIA", THIS FACT DOES NOT MAKE THE BANKRUPT-BUYER A "RESIDENT" OF THE STATE WITHIN THE MEANING OF SECTION 2980 OF THE CALIFORNIA CIVIL CODE.

(1) APPELLEE'S CASES DO NOT SUBSTANTIATE THIS THEORY.

The balance of the Brief for appellee is an attempt to prove, through the citation of certain legal authorities which will be hereafter discussed, that where a corporation has "all of its property . . . and all of its business (is) carried on" in a foreign state (Brief for Appellee, p. 13), it is nevertheless a "resident" of that foreign state within the meaning of recordation laws.

Let us examine each of the cases cited by the Appellee in support of this hypothesis for the purposes of determining whether or not any of said cases support such a theory:

(A)

Wait v. Kern River Mining Co., 157 Cal. 16.

In this action the plaintiff sought to obtain a decree in equity imposing a trust in his favor upon certain shares of stock held by the defendant, a corporation organized under the laws of Arizona. The question involved was whether or not the California courts had *jurisdiction* over such shares of stock for the purposes of making such a decree, it being conceded, as a matter of law, that such jurisdiction would vest only if said defendant corporation was a "resident" of this state. The

evidence disclosed that “all of its property was situate, and all of its business (was carried on) in this state”. The Court said (p. 21):

“As to such a corporation, so organized and situated in regard to all of its business and property, we can see no good reason why, as was said in the case last cited, ‘the fiction as to the *situs* of the corporation entity ought not to yield in the interest of justice to the actual facts’; to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the *situs* of its stock.”

The principles upon which the *Wait* case is based are entirely foreign to the matter at bar for the following reasons:

(a) The case holds that, for the purposes of acquiring *jurisdiction* over the *situs* of stock, a foreign corporation may be a “resident” of this *state*. It certainly does not hold that it can be a resident of any particular *county* within the state, which is the problem here. Moreover, it is axiomatic that a court desires to acquire *jurisdiction*, when that is the issue involved, for the purposes of following a fundamental policy of “putting an end to litigation”. If it did not acquire jurisdiction, the plaintiff would merely have to file a similar suit in Arizona to prove his claim. In the “interests of justice” this double litigation should be prevented.

(b) The *Wait* case contains definite evidence that “all of (the defendant corporation’s property) was situated, and all of its business carried on in this state”. The case at bar lacks any such evidence.

(B)

Sharp v. Big Jim Mining, et al., 39 Cal. App. (2d) 435.

This case is properly summarized by the appellee, and is distinguishable upon the identical grounds referred to above in our discussion of the *Wait* case. Although it is the general rule that courts will not interfere with the internal operations of a foreign corporation, there is no reason for a California Court to refuse to accept *jurisdiction* where the court actually has the means to enforce its orders. Thus, the court took upon itself the burden of solving certain *internal problems* of the Big Jim Mining Company by holding that such a corporation, under the circumstances, was sufficiently a "resident" of this *state* to enable the court to acquire jurisdiction. Again, the court was not asked to, nor did it hold that such a corporation could be a "resident" of any particular *county* within this state for *any* purpose, as the appellee is contending in the case at bar.

(C)

Hobbs v. Tom Reed etc. Co., 164 Cal. 497.

This case also needs no further comment other than it is distinguishable on the identical grounds mentioned above in our discussion of the *Wait* and *Sharp* cases.

each of the other forty-seven states to be determined by an examination of the amount of business each foreign corporation does in each county of each of forty-seven states? Or can the residential locale of foreign corporations within a state be determined by an examination of that corporation's activities within each of the forty-seven other states? According to the rule contended for by appellee, a prospective creditor in California must make an independent investigation of each foreign corporation in a hazardous attempt to determine how much business said foreign corporation does in the *state of its incorporation* in order to know whether a conditional sales contract involving mining machinery should be recorded under the requirements for "residents" or "non-residents" of California under the provisions of Section 2980 of the Civil Code. If confidence in public records is to be maintained, certainly such a rule cannot logically be supported.

Admittedly, it does not appear in the *Babcock* case that the bankrupt-buyer was "organized in Maine *solely* for the purpose of doing business in New Hampshire. Nor does *that* fact appear in this case.

Those two proposed lines of demarcation between the case at bar and the *Babcock* case having been exploded, the reasoning and rule of the *Babcock* case stands as clear, unequivocal law.

(B)

Appellee attempts to distinguish the *Ward* case on the ground that (Brief for Appellee, p. 20):

“It does not appear that the purchaser was organized in *Delaware* solely for the purpose of doing business, and that it was only doing business in the State of North Carolina.”

Again, let us say that *neither* of these facts are present in the record before this Court. Consequently, the case at bar cannot be differentiated from the *Ward* case on any such theory.

Appellee also argues that the *Ward* case had only to do with domestic corporations. This certainly is not true. The facts of that case disclose that the bankrupt-buyer was a *Delaware corporation doing business in North Carolina*, and was, of course, a foreign corporation.

Far from militating against our position, Appellee's quotation (Brief for Appellee, pp. 20-21) of the *Ward* case:

in C. S. Sec. 3311, designates the principal place of business of a domestic corporation as its residence for the purposes of this action, but makes no reference to a foreign corporation licensed to do business in this state, *the reasonable inference is that the Legislature created such corporations as non-residents.* (Italics ours.)

actually supports our position. Naturally, this is the “reasonable inference”. This is the “reasonable inference” to be deduced from section 2959a of the Civil Code.

With reference to the treatment of domestic and foreign corporations within the State of North Carolina the court said (p. 774 of the *Ward* case):

“If a domestic corporation is without a residence in any *one county* without legislative enactment fixing a residence, how could it be contended that a foreign corporation is a resident of any particular county in this state? The only inference deducible from the decisions of the highest court of the state and from the statutes is that *foreign corporations are treated as non-residents in this state*, and that the proper place for the recordation of mortgages executed by a foreign corporation is in the county where the personal property or some part thereof is situated.” (Italics ours.)

(C)

It should also be noted that Appellee did not even attempt to distinguish in his Brief, the reasoning of *Germania Fire Ins. Co. v. Francis* (Opening Brief for Appellant, p. 14), and *In Re Schollinberger* (Opening Brief for Appellant, p. 15) upon which we also strongly rely.

(3) APPELLEE'S THEORY IS PRACTICALLY UNSOUND AND PRESENTS AN UNWORKABLE RULE.

Appellee, in effect, contends that where every “substantial function and activity” of a foreign corporation is in the State of California, that corporation is a “resident” of the county designated by it (under sec. 405, Civil Code) as its “principal office”, for the purpose of the recordation requirements of Section 2980 of the Civil Code.

A theory so similar was presented to this Court in the case of *Matter of A & B Oil Co.*, 95 F. (2d) 946,

that we deem it well to refresh the court's recollection of this important case. It will be remembered that the Court then considered the problem of in what county in this state should a domestic corporation make recordation of its chattel mortgages. This court held that such recordation must be made in the county of the corporation's designated principal place of business, such county being the "residence" of a *domestic* corporation for the purposes of the recording laws. The facts of the case were that *all* operations of the bankrupt corporation other than the keeping of its books, its banking, and the taking of receipts and making of disbursements was done in Santa Barbara County. Its designated principal office of business was Los Angeles County. On page 947 of the opinion the Court says:

"Appellant contends that the corporation's residence is the county where it carries on the principal part of its operations. It argues that the 'principal office for the transaction of the business' required by the statute to be designated by the articles of incorporation is something distinct from the 'principal place of business' and that the principal place of business is the county where the greater portion of corporate activities is carried on. It then argues that the 'principal place of business' as distinguished from the statutory 'principal office for the transaction of business' is the residence of the corporation for the purposes of chattel mortgage recordation.

"It was long settled in California that a domestic corporation's residence is the county designated in its articles. We do not find that the Courts of California have ever looked with favor

upon a distinction between 'principal place of business' and 'principal office for the transaction of business'.

"In 1865 the California corporation law required the articles of incorporation to designate 'the principal place of business'. In *Harris v. McGregor*, 29 Cal. 124, 128, in considering this provision, the court said: 'But the "operations" of a corporation may be carried on in one county and their principal place of business within the meaning of the state be in another and distinct county . . . The "principal place of business" contemplated and intended by the statute is the principal office of the corporation at which the books of the corporation are kept and the officers usually and ordinarily meet for the purpose of managing the affairs and transacting the business of the corporation.

"And in *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318, 319, 33 P. 196, 197, the court said: 'The principal place of business of a corporation, as stated in its articles, is its residence; but, as in the case of an individual, its actual place of business, its scene of operations, the place where it buys and sells, may be a county entirely different from its place of residence.'

"To the same effect are *Gallup v. Sacramento & San Joaquin Drainage District*, 171 Cal. 71, 74, 151 P. 1142 and *Cook v. W. S. Ray Manufacturing Co.*, 159 Cal. 694, 698, 115 P. 318.

"We have neither reason nor authority for holding that this settled law to the effect that a corporation's residence is as stated in its articles has been changed by the amendment, Civil Code Cal. Sec. 290, subd. 3, which requires the articles

to indicate the county 'where the principal office for the transaction of the business of the corporation is to be located.'

"We do not conceive that this slight amendment of the wording has the effect of *shifting a corporation's residence from its principal office to the scene of its major operations. So to hold would make the protection afforded by the recordation of chattel mortgages a vain thing and a laughing stock in the case of a corporation carrying on industrial operations in more than one county. A prospective mortgagee would be required first to record the mortgage in the county where the property was situated and would then have to determine the corporation's residence by a careful survey and determination of which of California's more than fifty counties housed the largest proportion of his debtor's activities.*" (Italics ours.)

The very same reasoning is certainly applicable to the appellee's contention here. If Appellee's hypothesis is correct, every conditional vendor of mining machinery, when dealing with foreign corporations doing business in this state, must hazard a guess as to whether or not "every substantial function and activity" of *each* of the foreign corporations, with which it does business in California, is being conducted in this state, in order to be sure whether such foreign corporations are "residents" or "non-residents" within the meaning of the recording statute.

For example, let us take this hypothetical case: X corporation is organized under the laws of Nevada, but has qualified to do business in California and has designated the County of Los Angeles as its principal

office for the transaction of business. X corporation, besides doing business in California, does a similar amount of business in every other state in the union except Nevada. Who can say in which state (if any) it has such "substantial function and activity" as to make it a "resident" of that particular state for the purposes of the recording laws? Such a rule would require just as much an independent investigation of each foreign corporation's activities in this state in order to determine the proper county for the recording of contracts as would be necessary if the rule were applied to a domestic corporation's activities in each of the fifty-eight counties in California. Conditional vendors are entitled to know before hand in what county they are required to record their contracts; it should not be necessary for a court of law to decide each of these cases individually.

If the rule is as we contend it should be, then, in every case involving a foreign corporation, licensed to do business in this state, the contracts of conditional sale would be recorded only "where the property involved is located at the time the contract is executed by the buyer". This rule is simple, clear, and in strict accordance with all the federal cases involving the residence of a foreign corporation for the purpose of recording statutes.

The citation from *Corpus Juris* contained in Appellee's own brief (Brief for Appellee, p. 18) substantiates our analysis. If there is to be any *certainty* regarding recordings, a recording statute should not be construed so as to necessitate individual investigations of each foreign corporation doing business

in this state in a hazardous attempt to determine how "substantial" its activities are here. The reasoning of the *A & B Oil Company* case applies as strongly to foreign corporations as it does to domestic ones. If conditional vendors of *domestic* corporations must know definitely where to record their contracts, conditional vendors of *foreign* corporations are entitled to the same privilege.

So far as the "publicity" of recordations is concerned, what is more likely than a prospective creditor's examination of the public records of the County in which the "property involved is located" in the case of foreign corporations? The statute itself makes it necessary that a "contract of conditional sale of equipment and machinery used or to be used for mining purposes shall *also* be recorded in *every* case in the county where the property is situated". In other words, in the case of "residents" there is a *dual* recordation required (unless the county of residence is also the county where the property is located); in the case of "non-residents" a recordation in the county where the property is "located" is sufficient of and by itself. It is therefore perfectly obvious that the legislature considered a recordation in the county where the property is "situated" to be of more publicity value than a mere recordation in the county of "residence". Thus, in all cases involving machinery "used or to be used for mining purposes" a single search through the records in the county where the property is located will disclose to the prospective creditor whether or not that property is covered by a contract of conditional sale.

CONCLUSION.

In concluding, we can find no more appropriate summary of the "residential" status of a foreign corporation than is contained in the recent New Hampshire Supreme Court decision of *Blanchette v. New England Telephone & Telegraph Co.* (1939), 6 Atl. (2d) 161, 162:

"As applied to corporations the adjectives 'foreign' and 'non-resident' are usually regarded as synonymous. 27 Columbia Law Rev. 12, 13, note. A corporation has its residence and domicile in the state in which it is incorporated, and if it extends its activities to another jurisdiction it 'is in the same position as any non-resident who sends his agents into a state to do business for him'. Beale, Foreign Corporation, Sec. 73.

"Nor does the fact that a corporation has complied with all statutory provisions prescribed by a foreign state as prerequisites of the right to do business there make the corporation a resident of that state in the sense in which the word "resident" is used in the statutes relating to the venue of actions. . . .

"In the recent case of *Babcock, etc. Co. v. Spaulding* (1 Cir.), 86 F. (2d) 256, the Circuit Court of Appeals held that a Maine corporation which owned and operated mills in New Hampshire was not a resident of this state within the meaning of P. L. c. 216, Sec. 27, 28, 30, relating to conditional sales of personal property . . ."

In view of the foregoing, it is respectfully submitted that the Order of the District Court made on December 29, 1941, should be, by this Court reversed,

with instructions to said District Court to enter an Order Denying the Trustee's Petition to Recover Assets and granting to the appellant the relief prayed for in its Answer thereto.

Dated, San Francisco,

May 29, 1942.

Respectfully submitted,

ARTHUR P. SHAPRO,

Attorney for Appellant.

HAROLD A. BLOCK,

Of Counsel.

TRANSCRIPT OF RECORD

5
Supreme Court of the United States

October Term, 1943

No. 10110

ROBERT EARL HOPPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

UPON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 10110

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT EARL HOPPER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

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FRANK E. FLYNN, United States Attorney,

Federal Building

Phoenix, Arizona

Attorney for Appellee [3*]

In the District Court of the United States
for the District of Arizona

C 6163 Px

INDICTMENT

Viol. 50 U. S. C. 311 (Selective Training &
Service Act of 1940)

United States of America,

District of Arizona—ss.

In the District Court of the United States in and
for the District of Arizona, At the November term
thereof, A. D. 1941.

The Grand Jurors of the United States, impan-
eled, sworn, and charged at the term aforesaid, of
the Court aforesaid, on their oath present, that
Robert Earl Hopper, having theretofore registered

*Page numbering appearing at foot of page of original certified
Transcript of Record.

under the Selective Training and Service Act of 1940, on or about *or about* the 22nd day of June, A. D. 1941, and within the said District of Arizona, did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant thereto, that is to say, that the said defendant, Robert Earl Hopper, having been theretofore classified by his local draft board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowingly, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

United States Attorney for
the District of Arizona

H

Indictment

A True Bill

WALTER W. BAILEY,

Foreman of the Grand Jury

[Endorsed]: Filed Dec. 12, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard. Deputy Clerk. [4]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, FEBRUARY 2, 1942
(Phoenix Division)

October 1941 Term

at Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for arraignment this
day.

George E. Wood, Esquire, Assistant United States
Attorney, appears for the Government. The defend-
ant, Robert Earl Hopper, is present in person with
his counsel, Charlie Clark, Esquire, and is now duly
arraigned. The defendant waives the reading of the
indictment and a copy thereof is handed to him. On
motion of said counsel for the defendant,

It Is Ordered that this case be continued for plea
until Monday, February 9, 1942, at ten o'clock a. m.

[5]

[Title of District Court and Cause.]

MOTION TO QUASH INDICTMENT

Now Comes the Defendant above named by his
Attorney Charlie W. Clark, and moves to quash the
Indictment in the above entitled cause on the
grounds and for the reasons:

I

That the indictment does not state facts sufficient to constitute a crime or offense.

II

That the Statute is Unconstitutional and void and attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude;

III

That the Statute is Unconstitutional and void in that it unlawfully attempts to delegate legislative authority to an executive officer.

CHARLIE W. CLARK

Attorney for Defendant

Phoenix, Arizona,

February 7, 1942.

CHARLIE W. CLARK,

Attorney for Defendant,

1930 West Adams St.,

Phone—4-3744.

Service of above motion acknowledged this 7th day of February, 1942.

F. E. FLYNN

United States Attorney,

By R. HARRIS

[Endorsed]: Filed Feb. 7, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [6]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, FEBRUARY 9, 1942
(Phoenix Division)
October 1941 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for plea this day.

George E. Wood, Esquire, and Cecil A. Edwards, Esquire, Assistant United States Attorneys, appear for the Government. The defendant, Robert Earl Hopper, is present in person with his counsel, Charlie W. Clark, Esquire.

Defendant's Motion to Quash, heretofore filed herein, is now argued to the Court by counsel for the defendant, and

It Is Ordered that said Motion be submitted and by the Court taken under advisement, and that this case be continued for plea until after ruling on said Motion. [7]

ert Earl Hopper, is present in person with his counsel, Charlie W. Clark, Esquire. Louis L. Billar is present as court reporter.

The Government now announces ready for trial.

Counsel for the defendant announces not ready for trial for the reason that the defendant has had no opportunity to present defense and is denied a fair and impartial trial.

There being but twenty-six jurors in attendance on this Court, on stipulation of respective counsel,

It Is Ordered that the record show that counsel for the Government waives two peremptory challenges.

A lawful jury of twelve men is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case, be excused for the term.

The said United States Attorney now reads aloud the indictment to the jury and thereafter said counsel for the Government states to the jury the defendant's plea of not guilty to said indictment.

Said counsel for the Government now states the Government's [10] case to the jury and counsel for the defendant reserves statement to the jury.

Government's Case

Gerald T. Bigaouette is now duly sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Selective Service Registration Card.
- 2-A. Portion of line 217 of Classification record.
4. Form of notice to registrant.
5. Report of physical examination.
6. Form of notice to registrant.
7. Letter.
8. Form for conscientious objector.
9. Copy of letter.

Harry F. Dise is now duly sworn and examined on behalf of the Government.

Government's exhibit 3, Selective Service Questionnaire, is now admitted in evidence.

Thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued until 1:30 o'clock p. m. this day, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at 1:30 o'clock p. m., the jury and all members thereof, the defendant and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued

Harry F. Dise, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence: [11]

2-B. Balance of line 217 of Government's exhibit 2 for identification, and title and heading of columns thereof.

10. Copy of letter and conscientious objector report.

11. Assignment to work of national importance.

12. Copy of order to report for work of national importance.

Nellie Prince is now duly sworn and examined on behalf of the Government.

Government's exhibit 14, transcript of proceedings before Local Board, is now admitted in evidence.

Harry F. Dise, heretofore sworn, is now recalled and further examined on behalf of the Government.

Whereupon, the Government rests.

Thereupon, at three o'clock p. m., the jury being first duly admonished by the Court, is excluded from the court room.

Counsel for the defendant now moves for a directed verdict of not guilty on the following grounds.

1. Indictment is fatally defective and does not charge a public offense.

2. The statute on which the indictment is based is unconstitutional and void.

3. That no public offense or crime has been proved against defendant.

4. Board has acted arbitrarily and capriciously in classification.

5. No proof of notice to defendant.

It is ordered that said motion be and it is denied, and that an exception be allowed the defendant.

Whereupon, the jury and all members thereof return into court at 3:10 o'clock p. m., and further proceedings of trial are had as follows:

Counsel for the defendant now states the defendant's case to the jury.

Defendant's Case:

Robert Earl Hopper is now duly sworn and examined in his own behalf.

Defendant's Exhibit D. four registry return receipts, is now admitted in evidence. [12]

The following defendant's witnesses are now duly sworn and examined:

Edward Bucey

Ferne Hopper

And the defendant rests.

Both sides rest.

Thereupon, at 4:00 o'clock p. m., it is ordered that the further trial of this case be continued until Saturday, March 28, 1942, at ten o'clock a. m., to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused. [13]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
SATURDAY, MARCH 28, 1942
(Phoenix Division)

October 1941 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

The jury and all members thereof, the defendant and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now renews motion for a directed verdict on the same grounds, heretofore given, and

It is ordered that said motion be and it is denied.

All the evidence being in, the case is argued by respective counsel to the jury.

The Court now duly instructs the jury.

Counsel for the defendant now requests the Court to read Title 50, Section 305d, United States Code, to the jury, which request is now refused by the Court, to which counsel for the defendant excepts. Counsel for the defendant further excepts to the Court's refusal to give defendant's requested instructions to the jury.

The jury now retire at the hour of eleven o'clock a. m., in charge of two sworn bailiffs to consider of their verdict.

On motion of said counsel for the Government, with the consent of counsel for the plaintiff,

It is ordered that the United States Attorney be allowed to withdraw any exhibits which are records of the Selective Service Board on substitution of certified copies thereof. [14]

Subsequently, the defendant and all counsel being present, the jury return in a body into open Court at the hour of 11:15 o'clock a. m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

“C-6163 Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

Against

ROBERT EARL HOPPER,

Defendant.

VERDICT

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Robert Earl Hopper, guilty as charged in the indictment.

ROYAL W. LESCHER,

Foreman.”

The verdict is read as recorded, and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused from further trial jury service for the term.

It is ordered that this case be set for sentence April 6, 1942, at ten o'clock a.m., and that the defendant be allowed to remain on his present bond.

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, APRIL 6, 1942

(Phoenix Division)

April 1942 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding

C-6163

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT EARL HOPPER,

Defendant.

This case comes on regularly for sentence this day.

George E. Wood, Esquire, and Cecil A. Edwards, Esquire, Assistant United States Attorneys, appear for the Government. The defendant, Robert Earl Hopper, is present in person with his counsel, Charlie Clark, Esquire, and now urges defendant's motion for new trial. Whereupon, the Court announces that said motion was not filed within the time required by law. The defendant is now duly informed by the Court of the nature of the crime charged in the indictment; of his arraignment on said charge, and of his plea of not guilty thereto

and of his trial and conviction thereof by jury, and no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

C-6163

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT EARL HOPPER,

Defendant.

Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 50, United States Code, Section 311, unlawfully and feloniously failing to report as a conscientious objector for civilian work of national importance when notified to do so by local draft board,

It is ordered, adjudged and decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of two years.

It is further ordered that the Clerk deliver a certified copy [16] of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

Dated at Phoenix, Arizona, April 6, 1942.

DAVE W. LING

Judge

[Title of Cause.]

Charlie Clark, Esquire, counsel for the defendant, now files defendant's Notice of Appeal and moves for stay of execution for a period of ten days, and

It is ordered that said defendant be remanded to the custody of the United States Marshal.

Subsequently, Charlie Clark, Esquire, appears for the defendant and moves for an order fixing bail and cost bond on appeal, and

It is ordered that defendant's bail and cost bond on appeal be fixed in the penal sum of \$750.00.

On motion of said counsel for the defendant,

It is ordered that said counsel be allowed to withdraw Notice of Appeal, heretofore filed, to permit filing of Notice of Appeal with statement of grounds for appeal included therein. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of Appellant is Robert Earl Hopper, Jr., Camp Verde, Arizona;

The name and address of Attorney for Appellant is Charlie W. Clark, 1930 West Adams Street, Phoenix, Arizona;

The offense alleged in the Indictment in the action appealed from is violation of Section 311 of Title 50, United States Code (Selective Service and Training Act of 1940).

The date of Judgment is April 6, 1942.

The sentence is that the Defendant *The Defendant* be committed to the Custody of The Attorney General of The United States to be incarcerated in such penal institution as said Attorney General may designate for a period of two years.

I, Robert Earl Hopper, Jr., the above named Appellant, appeal to The United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above set forth and referred to on the grounds set forth below.

ROBERT EARL HOPPER, JR.
Defendant

CHARLIE W. CLARK
Attorney for Defendant

I.

That the indictment is fatally defective in that it does not state facts sufficient to constitute a crime or *offesne*. [18]

II.

That the statute is unconstitutional and void in that it deprives defendant of his liberty without due

process of law and subjects defendant to involuntary servitude, not as a punishment for crime.

III.

That the statute upon which this action is based is unconstitutional and void in that it delegates legislative authority to private individuals.

IV.

That the court erred in the reception of evidence offered by the United States and erred in the rejection of evidence offered by the defendant whereby defendant was denied a fair trial and was denied substantial justice.

V.

That the court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the case for The United States of America, which said motion was made on the grounds that (a) The Indictment is fatally defective and does not charge a public offense or crime; (b) that the statute in question, Title 50, Sections 301 to 311, is unconstitutional and void in that it violates the First Amendment to the United States Constitution in that it places a penalty upon the free exercise of religion and prohibits the free exercise of religion; (c) that said statute violates the Fifth Amendment to The United States Constitution in that upon its fact and as construed and applied, said statute deprives defendant of liberty and property without due process of law; (d) that said

act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects Defendant to involuntary servitude not as punishment for crime; (e) that said statute attempts to delegate legislative powers to private, non-governmental agencies and to private individuals; (f) that said statute delegates judicial power to sentence for an unlimited term of [19] involuntary servitude without opportunity to be heard, to a non-judicial tribunal; (g) That no public offense has been proved nor has any crime been proved against this defendant.

VI.

That the court erred in denying defendant's motion for a directed verdict made at the close of defendant's case upon the grounds stated in V hereinbefore.

VII.

That the Honorable Court erred in refusing to instruct the jury as requested by the defendant.

Received copy of Notice of Appeal April 6, 1942.

F. E. FLYNN,

U. S. Atty.

By C. A. EDWARDS,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 6, 1942. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [20]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
WEDNESDAY, APRIL 8, 1942
(Phoenix Division)

April 1942 Term At Phoenix
Honorable Dave W. Ling, United States District
Judge, Presiding

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel for the defendant and now presents defendant's cost and bail bond on appeal in the sum of \$750.00 with the National Automobile Insurance Company as surety thereon, and

It is ordered that said bond be approved and that the defendant be released thereon pending the determination of the appeal herein. [21]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Robert Earl Hopper, Jr., as principal, and National Automobile Insurance Company as surety, are held firmly and bound unto the United States of America in the full and just sum of Seven Hundred Fifty (\$750.00) Dollars to be paid to the said United States of America, to which payment

well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 8th day of April, in the year of our Lord One Thousand Nine Hundred and Forty Two.

Whereas, lately in the October term A. D. 1941 of the District Court of the United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff, and Robert Earl Hopper, Jr., as defendant, a judgment and sentence was rendered against the said Robert Earl Hopper, Jr., and the said Robert Earl Hopper Jr., has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and notice of the said appeal, in duplicate, having been filed with the clerk of the District Court of the United States for the District of Arizona [22] and a copy of such appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner and within the time required by law and the rules of Court in such cases made and provided.

Now, the condition of the above obligation is such that if the said Robert Earl Hopper, Jr., shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California, on such day or days as may be ap-

pointed for the hearing of said cause in said Court, and upon such day or days may be appointed by said Court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution or the judgment and sentence of said District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then above obligation shall be void, otherwise to remain in full force and effect.

Now, therefore, and as a further condition of this bond, that if the said Robert Earl Hopper, Jr., appellant above named, shall prosecute his appeal to the effect and shall pay all the taxable costs on appeal if he fails to make his appeal good, then above obligation shall be void, otherwise to remain in full force and effect.

And the surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond, the United States District Court for the District of Arizona may upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount of taxable costs in [23] the Circuit Court of Appeals which said surety is bound to pay on account of such breach, and render judgment therefore against said surety and to order execution therefor.

In witness whereof the undersigned have executed this bond this 8th day of April, 1942.

ROBERT EARL HOPPER, JR.

Principal

NATIONAL AUTOMOBILE INSURANCE COMPANY

By: SAMUEL H. WEISSBERG

Surety.

State of California,
County of Los Angeles—ss.

On this 7th day of April, in the year 1942, before me, David Gunter a Notary Public in and for said County and State, personally appeared Samuel H. Weissberg known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

(Seal) DAVID GUNTER

Notary Public in and for said County and State.

My Commission Expires March 7, 1945.

Approved this 8th day of April, 1942.

DAVE W. LING

U. S. Dist. Judge.

[Endorsed]: B. R. Filed Apr. 8, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [24]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
FRIDAY, APRIL 10, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

It is ordered that counsel for the Government
and counsel for the defendant appear before the
Court on April 11, 1942, at ten o'clock a. m., for
such directions as may be appropriate with respect
to preparation of record on appeal herein. [25]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
SATURDAY, APRIL 11, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

George E. Wood, Esquire, Assistant United
States Attorney, appears for the Government,

Charlie W. Clark, Esquire, appears as counsel for the defendant.

It is ordered that the Court Reporter in this case make available the transcript of testimony on or before April 25, 1942. [26]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
TUESDAY, MAY 5, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

On motion of Charlie Clark, Esquire, counsel for defendant,

It is ordered that the defendant's time within which to file Bill of Exceptions and Assignments of Error herein be and it is extended for a period of ten days. [27]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant above named, by his attorney, Charlie W. Clark, and says that subse-

quent to the institution of the above entitled cause and during the trial thereof on the 27th and 28th days of March, 1942, the court committed manifest error in the admission of evidence and in the rulings upon motions of the defendant, and for his assignments of error specifies the following:

I.

That on the 7th day of February, 1942, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the statute is unconstitutional and void in that it attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude and attempts to delegate legislative authority to an executive officer, and that the Honorable Court erred in denying said motion to quash indictment, which order was rendered on the 17th day of February, 1942.

II.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit No. 1 in Evidence, to which defendant excepted; said Government's Exhibit No. 1 in Evidence being a registration card alleged to have been signed by defendant and which the witness Gerald T. Bigaouette testified that he was from October 17, 1940 until December 31, 1940, the chief clerk of the Local Selective Service Board and that said [28] Exhibit

1 was a part of his records kept under the rules and regulations of the department, the basis of defendant's objection being that Government's Exhibit No. 1 was not properly identified, all as more fully appears on pages 11 and 12 of the Reporter's Transcript.

III.

That the Honorable court erred in overruling defendant's objection to Government's Exhibit 2 in Evidence, to which exception was taken, which Government's Exhibit 2 in evidence is the classification record of the United States Government kept on each individual that is registered in the county or local board, which objection was made upon the grounds that said exhibit was in no way connected with defendant, that there is no foundation laid connecting it with the defendant and that it has never been shown that the defendant has ever registered, as appears at pages 16 and 17, Reporter's Transcript.

IV.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 4 in Evidence, which objection was made upon the grounds that said Exhibit 4 was not properly identified and that it was in no way connected with this defendant, said Exhibit 4 being Conscientious Objector's Report, to which ruling the defendant excepted, as appears at page 25, Reporter's Transcript.

V.

The Honorable Court erred in overruling defendant's objection to Government's Exhibit 5 in Evidence, which is a report of physical examination, which objection was made upon the grounds that said Exhibit was in no way connected with the defendant, to which ruling exception was taken by defendant, as appears at pages 28 and 29, Reporter's Transcript.

VI.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 6 in Evidence, which said exhibit is a notice of classification, said objection being made upon the grounds that it is in [29] no way connected with this defendant and no foundation has been laid and exception duly taken to the ruling of the court, as appears at page 30, Reporter's Transcript.

VII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 7 in Evidence, which objection was made upon the grounds that it was not identified and had no bearing upon this defendant; said Government's Exhibit No. 7 being Special Form for Conscientious Objectors, and the defendant having excepted to the ruling of the court admitting said exhibit, as appears at pages 33 and 34, Reporter's Transcript.

VIII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 8 in evidence, being a letter as more fully appears in the Bill of Exceptions, addressed to the defendant, which objection was made upon the grounds that said letter was not shown to have any connection with this defendant and was not properly identified, to which ruling the defendant excepted, as appears at page 36, Reporter's Transcript.

IX.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 9 in evidence, being letter dated December 23, 1940, addressed to the defendant, which objection was made upon the grounds and for the reason that said exhibit has no bearing on this defendant and is not properly identified, to which ruling defendant excepted, as appears at page 28, Reporter's Transcript.

X.

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No. 3 for identification, being Government's Exhibit 3 in evidence, which purports to be a selective service questionnaire signed by defendant, which was admitted upon the [30] testimony of Harry F. Dise, who testified that he had been the clerk of the Yavapai County local board, Selective Service system, from January 1,

1941 to the present date, and that he took over the records on January 1, 1941, that had formerly been in the custody of the witness Gerald T. Bigaouette, and that said exhibit was in the file when said witness took over and that said exhibit was a part of the permanent records kept by his office, said Exhibit being objected to by the defendant upon the grounds that it was not shown that the instrument was signed by the defendant and that it was not connected up with the defendant in this case, and that it was incompetent, to which ruling defendant excepted, as appears at pages 47 and 48, Reporter's Transcript.

XI.

That the Honorable Court erred in receiving in evidence Government's Exhibit 2-B in Evidence, which Exhibit 2-B is the remainder of the Classification Record of the United States kept for each individual that is registered in the county of the local board, which objection was made upon the grounds that it was in no way connected with the defendant and that it was incompetent, to which ruling defendant excepted, as appears at page 51, Reporter's Transcript.

XII.

That the Honorable Court erred in denying defendant's motion for directed verdict of not guilty, which said motion was made on the 27th day of March, 1942, after the plaintiff had rested and which said motion was made upon the grounds: That the indictment is totally defective and does

not charge a public offense or crime; that the statute, Sections 301 to 311, inclusive, of Title 50, United States Code, is unconstitutional and void in that it violates the First Amendment of the Constitution of the United States in that it places a penalty on religion and prohibits the free exercise of religion, in that said statute violates the Fifth Amendment to the United States Constitution in that upon its face and as construed and applied said statute deprives defendant of his liberty and [31] property without due process of law and that said act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime and upon the further ground that said statute attempts unlawfully to delegate legislative power to private non-governmental agencies, or to private individuals, and upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard, to a non-judicial tribunal, and upon the further ground that no public offense has been proved nor has any crime been proved against this defendant, to which ruling the defendant duly excepted, as appears at pages 82 to 86, inclusive, Reporter's Transcript.

CHARLIE W. CLARK

Attorney for Defendant.

1930 West Adams Street,

Phoenix, Arizona.

Service of copy acknowledged this 14 day of May, 1942.

FRANK E. FLYNN

United States Attorney.

[Endorsed]: Filed May 15, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [32]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
FRIDAY, MAY 15, 1942

(Phoenix Division)

April 1942 Term

At Phoenix

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel for the defendant, Robert Earl Hopper, and now presents for settlement defendant's Proposed Bill of Exceptions, approved by the United States Attorney, and

It Is Ordered that said Proposed Bill of Exceptions be settled, allowed, and approved as the Bill of Exceptions and made a part of the record herein.

[33]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that in the District Court of the United States, for the District of Arizona, the Honorable Dave W. Ling, Judge of said Court presiding, and Frank E. Flynn appearing as attorney for the plaintiff and Charlie W. Clark appearing as attorney for the defendant, the following proceedings were had:

That on the 7th day of February, 1942, the defendant filed the following Motion to Quash Indictment:

“(Title of Court and Cause)

MOTION TO QUASH INDICTMENT.

“Now Comes the Defendant above named by his Attorney, Charlie W. Clark, and moves to quash the Indictment in the above entitled cause on the grounds and for the reasons:

I.

That the indictment does not state facts sufficient to constitute a crime or offense.

II.

That the Statute is Unconstitutional and void and attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude;

III.

That the Statute is Unconstitutional and void in that it unlawfully attempts to delegate legislative authority to an executive officer.

CHARLIE W. CLARK

Attorney for Defendant.

Phoenix, Arizona,

February 7, 1942.

CHARLIE W. CLARK,

Attorney for Defendant,

1930 West Adams St.,

Phone 4-3744. [34]

Service of the above motion acknowledged this 7th day of February, 1942.

FRANK E. FLYNN

United States Attorney

By.....

.....

STATEMENT OF POINTS AND AUTHORITIES RELIED ON IN SUPPORT OF MOTION TO QUASH.

I.

The Indictment does not allege by whom defendant was notified to report, whether he was notified before or after his arrest in the instant case, and does not allege where defendant was ordered to report. Defendant is evidently charged with an act of omission and yet the thing he omitted to do is not alleged.

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or intendment.

U. S. v. Britton, 107 U. S. 655.

U. S. v. Cruikshank, 92 U. S. 542.

Omission from an Indictment of any fact or circumstance necessary to constitute an offense will be fatal.

Harris v. U. S., 104 Fed (2) 41.

The Indictment is so indefinite and uncertain that defendant cannot properly raise the Constitutionality of the Statute and is so indefinite and uncertain as not to provide a reasonable standard of guilt or innocence.

II.

Defendant relies on the Fifth and Thirteenth Amendments to The Constitution of the United States.

CHARLIE W. CLARK

Attorney for Defendant."

That on the 9th day of February, 1942, said motion came on to be heard and on the 17th day of February, 1942, the Honorable Court entered its order denying said motion to quash the indictment.

[35]

That on the 27th day of March, 1942, upon the trial of said cause

GERALD T. BIGAOUETTE

was called as a witness on behalf of the plaintiff and testified as follows:

“Q. At any time did you have any official connection with the Selective Service Board?

A. Yes, sir.

Q. And in what capacity?

A. I was employed as chief clerk?

Q. And over what period?

A. From October 17th until January—the last year of my service there was December 31, 1940.”

And

“Mr. Flynn: I show you Government’s Exhibit 1, Mr. Bigaouette, and ask you if that was one of the records kept in the Selective Service Board Office at Prescott while you were in charge there?

A. Yes, sir.

Q. And the date, does it indicate the date on which that was made a part of the records?

A. Yes, sir.

Q. What is the date?

A. October 17th, 1940.

A. And is that a part of the records in connection with the record kept in the office covering the defendant’s transactions with the Board here and his registration, and so forth?

(Testimony of Gerald T. Bigaouette.)

A. Yes, sir; it is.

Q. And one of the records of which you are required to keep under the rules and regulations of the department?

A. Every registrant has one.

Mr. Flynn: We offer this in evidence.

Mr. Clark: I object to it, it is not properly identified.

The Court: It may be received.

(The document was received as Government's Exhibit 1 in evidence.)

Mr. Clark: It has no bearing on this defendant.

Mr. Flynn: I will read to you Government's Exhibit 1 in evidence. [36]

Mr. Clark: If it please the court, may we have an exception to the court's last ruling? Pardon me, Mr. Flynn.

The Court: Yes."

Thereupon, on said 27th day of March, 1942, the plaintiff proposed and offered in evidence the following paper:

(Testimony of Gerald T. Bigaouette.)

GOVERNMENT'S EXHIBIT 1.

“Serial Number Name: Robert Earl Hopper Jr.
2041

Order Number
217

Address: Camp Verde, Yavapai, Arizona
Telephone: Camp Verde #1—Haydons
Age: 22. Place of Birth: Garden Grove, California, U. S. A.

Date of birth: October 8, 1918.

Name of person knowing address: Mrs. Fern Hopper, Mother.

Address: Camp Verde, Yavapai, Arizona.

Employer's name: Robert Earl Hopper.

Place of employment or business: Camp Verde, Yavapai, Arizona.

I Affirm That I have verified above answers and that they are true.

BOB HOPPER.”

(Back Side of Card)

“Description of Registrant

Race, white. Height 5 ft. 10 in. Weight 190.
Complexion, light.

Color of eyes, blue. Color of Hair, brown.

Other obvious physical characteristics that will aid in identification:

Upper Forehead—hairline scar.

Signed by registrar Laura H. Wall

(Testimony of Gerald T. Bigaouette.)

Register for Camp Verde, Yavapai, Arizona

Date of registration: October 16, 1940

Yavapai County Local Board

October 17, 1940

P. O. Bldg. Prescott, Arizona."

And the said Gerald T. Bigaouette further testified for the plaintiff as follows:

"Mr. Flynn: I show you now, Mr. Bigaouette, Government's Exhibit No. 2 for Identification, consisting of two sheets, and ask you if those two sheets, from the records of the local Selective Service Board of Prescott, were kept while you were in charge of the office? I don't mean by that that all of the entries on them were made by you but were those records from the records of that——

A. (Interrupting) Yes, they were. This is all my handwriting." [37]

Thereupon the following paper was offered and proposed in evidence by the plaintiff:

(Testimony of Gerald T. Bigaouette.)

GOVERNMENT'S EXHIBIT 2
in Evidence

1 Order No. Par. 317	2 Name of Registrant Par. 317	3 Serial No.	4 Age	5 Race
217s	Robert Earl Hopper, Jr.	2041	22	wh
6 Date of volunteering for Induction	7 Date of Record Transferred by or to Local Board Pars. 383 and 425	8 Date Registrant's Record Returned Pars. 383, 384, 425		
XXX	XXX	XXX		
9 Date Questionnaire Mailed Par. 319	10 Return of Questionnaire extended to Par. 320	11 Date Questionnaire Returned		
11-19-40	XXX	11-27-40		
12 Date Claim for Deferment Filed by Another	13 Classification Par. 332 IV	14 Par. 336 Date Notice to appear for Physical Exam. Mailed		
XXX	E	11-28-40		
15 Date Registrant Appeared for Exam. Par. 336	16 Date Classification by Local Board Mailed to the Registrant	17 Date Request to Appear Before Local Board Received Par. 368		
12-2-40	1-3-41 12-12-40	XXX		
18 Time fixed for Registrant to appear before Board	19 Enter if Appeared	20 Date of Appeal to Board of Appeal Par. 373		
XXX	XXX			
21 Date of Forwarding Registrant's Record to Board of Appeal	22 Date Notice of Board of Appeal's Decision mailed by Local Board Par. 377			
XXX	XXX			

(Testimony of Gerald T. Bigaouette.)

II

CLASSIFICATION RECORD CONT'D

Local Board for Yavapai County, Ariz.

23 Date Notice of Continuance of Classification Mailed	24 Date of Order to Report for Induction	25 Time Fixed for Registrant to report for Transportation to Induction Station
XXX	XXX	XXX

26 Final Disposition at Induction Station	27 Remarks Including Information of Appeals to President, Par. 380, also Pars. 344, 389, & 391	28 Order Number Par. 317
XXX	Request for D.S.S. Form 47 Requested after Classifica- tion—12/19/40 Mailed 12/23/40	Rec'd 1-3-41 217

And the said Gerald T. Bigaouette further testified:

“Q. Generally, what is this record?

A. It is a classification record of the United States Government regulations to keep on each individual that is registered in the County or in the local Board.

Q. I will ask you if, in this record, which is Government's Exhibit No. 2, is a record covering the transactions of the defendant here, Robert Earl Hopper, Jr.?

A. Yes, sir; there is.

Q. I will ask you to examine the records affecting the first registration there and see if you made all of those entries there, and what, if you made any entries in that?

(Testimony of Gerald T. Bigaouette.)

A. I made every notation on here except one, two, three, four, five.

Q. And were those entries made approximately at the time of the transactions which they purport to record?

A. Yes, they had to be made. They had to be kept to date.

Q. And they correctly reflect those transactions that you made there? A. Yes, sir.

Q. Now, calling your attention to this line which is marked here "217-S", and that runs across both sheets, is that correct? [39]

A. That is correct, sir.

Q. And on that line are recorded all of the entries affecting the defendant?

A. On the sheets, yes.

Q. I mean, the other entries and the other lines have nothing to do with this defendant?

A. Nothing at all.

Q. Now, where are the entries; will you indicate the entries there that you didn't make?

A. Well, I didn't put this pencil "S" in there. I don't know who put that in. I didn't make this classification here. I don't know, this "E" (indicating on document).

Q. Classification?

A. That is under "4", Classification "4", and there is an "E" entered there.

Q. That is under Column No. 13, is that correct? A. That is correct, sir.

(Testimony of Gerald T. Bigaouette.)

Q. And how about the entry under Column 14?
A. That is my entry——

Mr. Clark: (Interrupting) If the court please, I want to enter a general objection to testifying, because it is not in evidence.

Mr. Flynn: I am trying to exclude the part he didnt make, that is all. I am not testifying to what is in here.

The Witness: I also didn't make this entry (indicating on document).

Q. You didn't?

A. No, sir; or the entry under the Column 16 and there is an entry under Column 28 here that I didn't make. However, I made one of them.

Q. You made the one in the black ink?

A. In the black ink.

Q. And the one in red under 27 and 28, you didn't make?

A. No. Under 27, that is my handwriting, but under 28, I didn't.

Q. The red ink entry under Column 28, you didn't make?
A. I didn't make. [40]

Mr. Flynn: In order to avoid recalling the witness back and forth on the stand, I would like at this time to offer in evidence this line, which is Government's Exhibit 2 for Identification, this number 217, with the exception of the entry—what was that first column?

A. There is a pencil notation made that I didn't——

(Testimony of Gerald T. Bigaouette.)

Mr. Flynn: (Interrupting) Except the "S" bearing the numbers 217 and the entries in Column——

A. (Interrupting) 16.

Q. Above the——

A. Above the figures 1-3-41, I didn't put in there.

Q. And also the red ink entry under Column 28? A. That is correct.

Mr. Flynn: With the exception of those, which we will offer when we have identified them, but we will offer in evidence this, your Honor, for the purpose of examining the witness as to the entries and the papers referred to.

Mr. Clark: Well, we will object to the offer of this exhibit in evidence on the grounds that it is in no way connected with the defendant, no way shown——

The Court: You haven't seen it yet, have you?

Mr. Clark: It hasn't been connected with the defendant.

The Court: You don't know whether it is or not; you haven't looked at it.

Mr. Clark: Upon the ground there is no foundation laid connecting it with this defendant. There is no showing that this defendant has registered; no showing it is in any way connected with him, and I may have a further objection.

(Testimony of Gerald T. Bigaouette.)

The Court: Well, if that is your only objection, it will be overruled.

Mr. Clark: Why, I haven't seen it yet, so I may have a further objection.

The Court: You had better show it to counsel.

Mr. Flynn: Now, Mr. Bigaouette, this first column, Column No. 1, what does the—what do the figures 217 refer to there?

A. That is——

Mr. Clark: (Interrupting) If the court please, I object to them testifying from a matter not in evidence.

Mr. Flynn: This was just admitted. [41]

The Court: You haven't shown it to counsel yet. He is supposed to have a look at it.

Mr. Flynn: He didn't ask for it.

The Court: Well, show it to him.

(Thereupon the document was handed to Mr. Clark.)

Mr. Clark: We have no further objections other than previously stated.

The Court: All right, it may be received.

Mr. Clark: May we have an exception?"

And the said Gerald T. Bigaouette further testified:

"Mr. Flynn: (Handing document to witness.) Who mailed that?

A. Who mailed that?

Q. Yes.

A. I did, sir. It was mailed jointly by the

(Testimony of Gerald T. Bigaouette.)

Do not write below this line. National Headquarters will complete this information.

Assigned to..... (Date)

Reported to

Transferred to

Discharged from

Service satisfactorily completed on.....
and

D.S.S. Form 48

16-20057

Instructions

1. The Local Board will make four copies of this form for each registrant when the registrant has been placed in Class IV-E. Under "Remarks" the board will indicate any information that will assist National Headquarters to properly assign the registrant to work of national importance under civilian direction.

2. All four copies of this form will be held by the board until the registrant's order number is reached and then they will be dated, signed by a member of the board; three copies shall be mailed to the State Director, and the fourth copy placed in the cover sheet of the registrant.

3. The State Director will forward two copies to National [43] Headquarters and retain one copy for State Headquarters file.

(Testimony of Gerald T. Bigaouette.)

4. Upon receipt of this form, National Headquarters will decide where the registrant will be assigned to work of national importance and will issue the necessary instructions to the State Director on D. S. S. Form 49 Assignment to Work of National Importance. The State Director will mail the Local Board a copy of the assignment, giving location of the camp where assigned, name of the person to whom registrant must report, and the date when to report.

At least 5 days prior to the time when the registrant must report for assignment to the camp, the Local Board must notify the registrant by mailing him the Order to Report for Work of National Importance (D. S. S. Form 50)

U. S. Government Printing Office
16—20057."

And in identification of said paper the said witness, Gerald T. Bigaouette testified as follows:

"Q. Referring to this Government's Exhibit 4 for Identification and to Column 14 in Government's Exhibit 2A in evidence, I will ask you if such a notice properly filled out was mailed to this defendant? A. Yes, sir.

Q. And in a franked envelope addressed to Camp Verde, Arizona, is that right?

A. No, sir.

(Testimony of Gerald T. Bigaouette.)

Q. How was it mailed?

A. It is mailed—those forms——

Q. (Interrupting) These are post-cards themselves? A. That is right, sir.

Q. The address is placed on the card?

A. That is correct.

Q. And that was done by you and under your supervision? A. Yes, sir——

Mr. Clark: (Interrupting) We object to that as leading and suggestive, your Honor.

Mr. Flynn: Now, we offer it in evidence.

Mr. Clark: I make the same objection that I made prior.

The Court: It may be received.

(The document was received as Government's Exhibit 4 in evidence)

Mr. Clark: May we have an exception?"

[44]

Thereupon, on said 27th day of March, 1942, the witness Gerald T. Bigaouette further testified:

"Mr. Flynn: Now, I show you Government's Exhibit 5 for Identification and I will ask you if that is a part of the records which were kept in the office at Prescott there, the Selective Service office while you were in charge?

A. That is correct, sir.

Q. And what is the source of that record; where did it come from, if you know?

A. It comes from—we sent it at the time of

(Testimony of Gerald T. Bigaouette.)

that card which was just offered as an exhibit.

Q. That is, Exhibit 4?

A. Was sent to the registrant. We, in turn, send one of these to the examining physician that had it filled out, the man's name and address, initial, and it is accompanied by a letter. It was at that time,—I don't know now whether it is or not, telling the doctor at what time he would report.

Q. All right, go ahead.

A. And the doctor, in turn, fills it out and it is returned to the office for—and is kept with the records and the Board so acts upon this report that is wrote up by the examining physician.

Q. It is kept as a part of the files of the office there? A. That is correct.

Q. And is the basis, then, for action of the Board?

A. That determines whether or not he can be for classification, whether he is physically unfit, which comes under a different classification.

Q. Referring to the signature of Alfred B. Carr, is that the signature of Alfred B. Carr who was chairman of the Board at that time?

A. Yes, sir.

Q. And that is placed in there after the report of the physical examination is returned to the office? A. To the office by the doctor.

(Testimony of Gerald T. Bigaouette.)

Q. Are there any other entries on this exhibit except what was there when it was returned to your office?

A. Yes, there is this writing on here and this stamp right here (indicating on Exhibit 5).

Mr. Flynn: That is the stamp the clerk just put on here and is a part of this record, identifying it as Exhibit 5?

A. Yes, sir. [45]

Q. This "Exhibit No. 2" here in pen (indicating on exhibit)?

A. I don't know anything about it.

Q. That wasn't on it when it was returned to you? A. Not that I remember, sir.

Q. Anything in the body of the instrument, changes or any additions made to it?

A. Not—I—none that I can swear about. It looks the same as it did when it came back."

And thereupon, the plaintiff offered in evidence the following paper:

"GOVERNMENT'S EXHIBIT 5
in Evidence

Report of Physical Examination

Hopper, Jr. Robert Earl. Order #217. Race: white.

Occupation: Farm laborer and cattle raiser.

Address: Camp Verde, Yavapai, Arizona.

Mother tongue: English.

(Testimony of Gerald T. Bigaouette.)

Birthplace: Garden Grove, California.

Date of birth: October 8, 1918.

Statement of Person Examined

Do you consider that you are now sound and well? Yes.

What illnesses, diseases, or accidents have you had since childhood? None.

Have you ever had any of the following? If so, give dates: all answers—No.

When were you last treated by a physician, and for what ailment? Tonsillectomy 10 years ago.

Have you ever been under treatment at a hospital or asylum? No.

I further certify—

Place: Cottonwood, Ariz.

Date: 12-2-40.

ROBERT EARL HOPPER, JR.

Alfred B. Carr

January 3, 1941

Physical Examination by Physician

1. Eye abnormalities—none.
2. Ear, nose, throat abnormalities—none.
3. Mouth and gum abnormalities—none.
4. Teeth.
5. Skin—normal.
6. Varicose veins—none.
7. Hernia—none.
8. Hemorrhoids—no.

(Testimony of Gerald T. Bigaouette.)

9. Genitalia—normal.
10. Feet—good.
11. Musculo defects—none.
12. Abdominal viscera—normal.
13. Cardiovascular system—good.
14. Lungs—normal.
15. Nervous system—normal.
patellar—normal.
16. Endocrine disturbances—No.
17. Blood test syphilis—negative.

(Kline, Hinton & Kahn—12/5/40) [46]

I certify that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is: **Class I A.**

Place: Cottonwood, Ariz.

Date: 12/2/40

J. T. TAYLOR

Examining Physician

I hereby appeal from the finding of the above Local Board to the Board of Appeal because of: Conscientious objections.

ROBERT EARL HOPPER JR.

Registrant.

Date: Dec. 16, 1940.

* * * * *

Vision:

Right eye 20/20

Left eye 20/20

Hearing:

Right ear 20/20

Left ear 20/20

Height 69½ in.

Weight 189½ lb.

(Testimony of Gerald T. Bigaouette.)

Girth (at nipples): Posture Good

Inspiration 42 in.

Expiration 36 in.

... Girth (at umbilicus) 35 in. Frame good

Pulse: Color of hair light brown

Sitting 74 Color of eyes blue

After exercise 88 Complexion ruddy

2 min. after exercise 77 Blood Pressure:

Urinalysis: Systolic 130

sp. gr. 1.020 Diastolic 75

Albumin negative

Sugar negative

Microscopic not made

* * * * *

1. Order No. 217. Local Board Yavapai.
State Arizona.

2. Date specimen.

3. Hopper Robert Earl
(Last name) (First Name) (Middle name)

4. Camp Verde Yavapai Arizona
(town or city) (County) (State)

5. Birth date October 8th. 1918. Race White.

6. Suspicious open lesions: Primary——
Secondary.....

7. CC discharge: Yes..... No. X. Smear:
Pos..... Neg..... Taken but not yet ex-
amined..... Not done.....

8. Qualified for military service:

General Limited Disqualified

X.

JOHN T. TAYLOR, M. D.

JOHN T. TAYLOR,

Examining Physician.

(Testimony of Gerald T. Bigaouette.)

Laboratory Report of Serologic Blood Test

9. Lab. Specimen No. 31868 Neg. Pos. Doubt.

X

10. Name of test Kline, Hinton & Kahn.

11. State Board of Health Lab.

FRED J. BAKER,

Laboratory Director.

Flagstaff, Arizona

(To Selective Service Board)

Date of Report 12/5/40

16—18064." [47]

Instructions

1. This form is filled out in duplicate, with black ink or typewriter. All entries must be placed on both copies. Only originals are signed. If a registrant is transferred to another board for physical examination, that board makes out this report in triplicate.

2. Recommendations and findings as to qualification or disqualification for service are indicated by the completion of the appropriate finding, if such completion be required, and by lining out those not appropriate.

3. Any answer in the registrant's statement indicating a possible disqualification will be followed up by searching inquiry and examination and the result noted in the examination physician's report.

4. All deviations from normal will be noted under the proper heading.

(Testimony of Gerald T. Bigaouette.)

5. The space under the heading "Remarks" will be used for continuation of an answer if the allotted space is insufficient, and for any further statements that the examining physician may desire to make.

6. After the examining physician has made his entries on both copies, the duplicate copy is kept in the registrant's cover sheet until appeal based on this report is waived or is acted on by the Board of Appeal. The duplicate is then sent to the Governor (State Headquarters for Selective Service) for forwarding to the Director of Selective Service.

7. If the registrant is examined by the Medical Advisory Board, only the original is sent to that board.

8. When the registrant reports to an induction station he takes the original with him.

Note:—Use this form not only for registrants examined but also for physically disqualified registrants placed in Class IV without physical examination.

D.S.S. Form 200—Report of Physical Examination."

And the following proceedings were had thereon:

"The Court: It may be received."

And

"Mr. Clark: May it please the court, has Exhibit 5 been ruled upon?"

(Testimony of Gerald T. Bigaouette.)

The Court: Yes.

Mr. Clark: May we have an exception?

The Court: Yes."

Thereupon, the Government offered in evidence the following paper: [48]

GOVERNMENT'S EXHIBIT 6

In Evidence

Selective Service

Official Business

Penalty for Private Use to Avoid

Payment of Postage, \$300.

.....
(Stamp of Local Board)
.....

.....
.....
.....

NOTICE OF CLASSIFICATION

Note: Appeal from a classification by a Local Board or Board of Appeal must be made within five days from the date of this notice at the office of the Local Board.

The person named herein whose Order No. is	Be Alert
(Local Board Has been classified by (..... (Board of Appeals.....	Keep in touch with your Local Board. Notify it of any change of address.
in Class.....until..... (Date)	Notify it of any fact which might change your classifica- tion.
..... Member of Local Board	

(Testimony of Gerald T. Bigaouette.)

Notify your employer
of this classification

.....
(Date)

Failure to notify the Board of these facts within five days of the happening thereof is an act punishable by fine and imprisonment."

D.S.S. Form 57

And the said witness Gerald T. Bagouette testified thereto as follows:

"Mr. Flynn: Showing you Government's Exhibit 6 for Identification, I will ask you if that is the form card that was mailed to the defendant on the 12th of December, 1940?

A. That is correct.

Q. And that was filled out, blanks were filled out showing his classification and the address placed on it and placed in the mail under your direction?

A. That is right, and bears the stamp of the local Board on it.

Mr. Flynn: We offer this Government's Exhibit 6 in evidence, for the purpose of showing to the jury the form used.

Mr. Clark: Well, we object to it on the same grounds, that it is in no way connected with this defendant. [49]

The Court: It may be received.

(The document was received as Government's Exhibit 6 in evidence).

Mr. Clark: May we have an exception?"

(Testimony of Gerald T. Bigaouette.)

Thereupon, the plaintiff offered in evidence the following paper:

GOVERNMENT'S EXHIBIT 7

For Identification

“Please send me blanks for Conscientious Objectors.

BOB HOPPER

Camp Verde, Arizona.”

And said witness Gerald T. Bigaouette testified thereto as follows:

“Mr. Flynn: I show you Government's Exhibit 7 for Identification and ask you if you recognize it, having seen it before?

A. Yes, sir; I have.

Q. Where did you first see it?

A. Inclosed with some correspondence, and I don't remember just which it was.

Q. Did it come into the office there and is a part of the records of the office?

A. That is correct, sir.

Mr. Flynn: We offer it in evidence.

Mr. Clark: We object to it until it is identified, to be shown to have some bearing upon this defendant.

The Court: It may be received.

(The document was received as Government's Exhibit No. 7 in evidence.)

Mr. Clark: May we have an exception?”

(Testimony of Gerald T. Bigaouette.)

(Thereupon Government's Exhibit No. 7 in evidence was read to the jury by Mr. Flynn.)

(Thereupon, the plaintiff offered the following paper in evidence:

Special Form for Conscientious Objector

Name Robert Earl Hopper, Jr.

(First) (Middle) (Last)

Address

Camp Verde Yavapai Arizona

(City, town, village) (County) (State)

Order No. 217

Yavapai County Local Board

December 23, 1940

P. O. Bldg Prescott, Arizona

This form must be returned on or before December 28, 1940 (Five days after date of mailing or issue) [50]

Instructions

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Questionnaire.

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be

(Testimony of Gerald T. Bigaouette.)

for the information only of the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be conscientious objector, the Local Board shall proceed in the ordinary course to classify him upon all other grounds of deferment, and shall consider and pass upon his claim as a conscientious objector only if, but for such claim, he would have been placed in Class I. The procedure for appeal from a decision of the Local Board on a claim for conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector: Provided, however, That the Local Board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—Claim for Exemption

Instructions.—The registrant must sign his name to either Statement A or Statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(Testimony of Gerald T. Bigaouette.)

A. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in combatant military service or training therefor; but I am willing to participate in noncombatant service or training therefor under the direction of military authorities.

.....
(Signature of registrant)

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participate in any service which is under the direction of military authorities.

ROBERT EARL HOPPER JR.

(Signature of Registrant)

Series II.—Religious Training and Beliefs

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Describe the nature of your belief which is the basis of your claim in Series I above.

(Testimony of Gerald T. Bigaouette.)

As a Christian I believe in following the teachings of Jesus Christ. Jehovah's witnesses are entirely neutral to the affairs of the world. The Bible tells us that every one of the witnesses from Abel down to the present time have been entirely neutral to the controversies between the nations, because all nations are against God and his kingdom. [51]

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

For the past year the Watchtower Society had maintained a school or company at Cottonwood, and Clarksdale, for the purpose of aiding students of the Bible. This Bible society gives instructions to students by correspondence for a careful study of the scriptures. I have received instructions from ministers, servants, and elders regularly each week in the study of the bible.

D.S.S. Form 47

16-18144

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

I do not rely upon any individual for any guidance. I look to the Bible as my instructor and to God and to Christ Jesus.

4. Under what circumstances, if any, do you believe in the use of force?

(Testimony of Gerald T. Bigaouette.)

If a thief breaks into my house God's law allows me to engage in self defense, also if attack on the street or elsewhere. I am not a Pacifist.

5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I don't take part in any affairs of the world. I do not vote.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

Yes, orally, I have expressed my views to friends, neighbors and to strangers, about God's kingdom to be set up on the earth. In the community where I live.

Series III.—General Background

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.

(Testimony of Gerald T. Bigaouette.)

Name of School	Type of School	Location of School	Dates Attended	
			From	to
Camp Verde High	Public	Camp Verde	1933	1937
University of Arizona	Public	Tucson	1937	1938

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged:

Type of Work	Name of Employer	Address of Employer	Period Worked	
			From	to
Cattle raising & Farming	Earl Hopper	Camp Verde	1940	1941

[52]

Series II.

A.1. We Jehovah's Witnesses are not pacifists, as Jesus stated "if my kingdom was of this world, then would my servants fight." (John 18:36) Abram with the approval of Jehovahs fought against a nation only when Lot, also a faithful servant of God was assaulted and carried off as a captive. At Hebrews Eleventh Chapter, it says that all faithful followers of Almighty God were entirely neutral to all controversies between nations.

(Testimony of Gerald T. Bigaouette.)

Series IV.

A.2. "Ye are my witnesses saith the Lord and my servant whom I have chosen; that ye may know and believe me, and understand that I am he; before me there was no God formed, neither shall there be after me. I even I am the Lord; and beside me there is no savior. I have declared, and have saved, and I have showed, when there was no strange God among you; therefore ye are my witnesses, saith the Lord, that I am God. (Isaiah 43:10-12)

* * * * *

Yavapai County Local Board

December 31, 1940

P. O. Bldg. Prescott, Arizona

3. Give *an* addresses and dates of residences where you have formerly lived:

Name of City, Town, or Village	State or Foreign Country	Dates of Residence	
		From	to
Camp Verde	Arizona	1918	1941

4. Give the name, and address, and country of birth of your parents and indicate whether they are living or not.

Earl Hopper Fort Stanton N. Mexico U.S.A.
Fern Hopper Jerome Arizona U.S.A. Both living.

(Testimony of Gerald T. Bigaouette.)

Series IV.—Participation in Organizations

Instructions.—Questions 1, 2 and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organizations or establishment. If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a Christian organization? Yes. If your answer to question 2 is yes, answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you:

Jehovah's Witnesses, a group of Christians whose headquarters are 117 Adams Street, Brooklyn, New York.

(b) When, where, and how did you become a member of said sect or organization?

In 1939 at Lynwood, California, Having kingdom message presented to me, I became convinced that it was the truth. [53]

(c) State the name and location of the church, congregation, or meeting where you customarily attend:

Watchtower study, Clarksdale, Arizona.

(Testimony of Gerald T. Bigaouette.)

(d) Give the name and present address of the pastor or leader of such church, congregation or meeting:

May Scott, Cottonwood, Arizona.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war:

The true followers of Christ Jesus must be diligent to obey this and Jehovah's commandment. As Christ stated "They are not of the world, even as I am not of the world." (John 17:14, 16. John 15:19) "Neither pray I for these alone, but for them also which shall believe on me through their words." (John 17:20)

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military:

None.

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war:

Name	Full Address	Occupation or Position	Relation to you
Homer Paffenbarger	11030 Pine St. Lynwood, Calif.	Carpenter	None
Irvin Scott	Cottonwood, Arizona	Shovel Operator	None
E. F. Bucey	Covington, Tenn. R. 2	Pioneer	None
A. Stimmick	Clarksdale, Arizona	Works in Smelter	None

(Testimony of Gerald T. Bigaouette.)

Registrant's Affidavit

Instructions.—The claim made on this form will not be considered unless it is supported by the following affidavit. (If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.)

State of Arizona,
County of Yavapai—ss.

I, Robert Earl Hopper, Jr., do solemnly swear (or affirm) that I am the registrant described in the foregoing questions and answers, that I know the contents of my said answers, and that each and every statement of fact in my answers to said questions is true, to the best of my knowledge and belief.

ROBERT EARL HOPPER JR.

(Registrant sign here)

Subscribed and sworn to (or affirmed) before me this 28th day of December, 1940.

JESSIE STEPHENS

(Signature of officer administering oath)

Postmaster

(Designation of officer)

[54]

If the registrant has received assistance from an advisor, the advisor shall sign the following statement:

(Testimony of Gerald T. Bigaouette.)

I have assisted the registrant herein named
in the preparation of this form.

.....
(Signature of advisor)
.....

.....
(Address of advisor)''

and the witness, Gerald T. Bigaouette, testified
thereto as follows:

“Mr. Flynn: I show you Government’s Ex-
hibit 8 for Identification, which purports to be
Form DSS 47, and ask you if that was a part
of the records up there in the office, or if that
is the form which you mailed to the defendant?

A. Well, this is the form.

Q. That was mailed in the regular course of
business as other letters were mailed there un-
der your direction?

A. That is right.

Q. There to the defendant at Camp Verde,
Arizona?

A. I sent this one myself, I know.

Q. Were you in the office when this was re-
turned to the office?

A. Yes, sir.”

And

“Mr. Flynn: We offer this in evidence as
Government’s Exhibit 8 in evidence).

(The document was received as Government’s
Exhibit 8 in evidence.)”

(Testimony of Gerald T. Bigaouette.)

And

“The Court: It may be received.

Mr. Clark: May we have an exception?

The Court: Yes.”

Thereupon, the plaintiff offered in evidence the following paper:

GOVERNMENT'S EXHIBIT 9
in evidence

“December 23, 1940

Mr. Robert Earl Hopper, Jr.

Camp Verde

Arizona

Dear Sir: [55]

In compliance with your request, included herewith is D.S.S. Form 47, Special Form for Conscientious Objector.

Please complete this form in its entirety, have signature notarized or acknowledged, and return to this office at once.

Yours very truly,

SELECTIVE SERVICE BOARD

By GERALD T. BIGAOUETTE

GTB/dv Chief Clerk.”

And the witness, Gerald T. Bigaouette, testified thereto as follows:

“ . . . Q. I show you now Government's Exhibit 9 for Identification?

A. Yes, sir.

(Testimony of Gerald T. Bigaouette.)

Q. And is Government's Exhibit 9 for Identification a carbon copy of that letter?

A. Yes, sir.

Q. And you signed the original and enclosed it in the envelope with this form?

A. I did, sir.

Mr. Flynn: We offer Government's Exhibit 9 in evidence.

Mr. Clark: We object to this being received in evidence until it is identified to have some bearing on this defendant.

The Court: It may be received.

(Thereupon the document was marked as Government's Exhibit 9 in evidence.)

Mr. Clark: May we have an exception?

The Court: Yes."

GOVERNMENT'S EXHIBIT No. 14

Proceedings Before the Local Board of
Yavapai County, June 20, 1941

Present: Alfred B. Carr, Chairman, Lauren V. Seares, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.

Order No. 217

In the Matter of the Application of

ROBERT EARL HOPPER, JR.,
for Classification as a Minister of Religion,
and his Application for Extension of Time
within which to Appeal the Decision of
the Local Board of Yavapai County.

(Testimony of Gerald T. Bigaouette.)

WILLIAM ROBERT DINGMAN,

being first duly sworn, testified as follows:

By Mr. Carr:

Q. Your name is William Robert Dingman? A. Yes sir.

Q. And your postoffice address is Box 190, Prescott, Arizona? A. Yes sir.

Q. You live on Vyne and Adams Streets in Forbing Park? A. That's right.

Q. You were born on May 3, 1919?

A. I was.

Q. And you are registered for Selective Service with Local Board No. 2 Woodburn, Oregon? A. That's right.

Q. State what your connection is, if any, with the organization known as Jehovah's Witnesses.

A. I am Company Servant, Prescott Company of Jehovah's Witnesses.

Q. Does that give you jurisdiction of Mr. Hopper at Camp Verde within your organization?

A. Jurisdiction? Well, I direct his activities and show him how that is carried on. Give him the latest information from the Watchtower Society, and the latest publications on religious issues, and give him any instructions that come from the Watchtower Society.

Q. Did you in the spring of this year receive any communication from a superior of

(Testimony of Gerald T. Bigaouette.)

yours in the organization in regard to classification of members of your organization as ministers of religion?

A. From the General Counsel of Jehovah's Witnesses, I did.

Q. Who is he? A. H. C. Covington.

Q. And what is his address?

A. I don't know at the present time. I can find out. I haven't it at the present time. I could find out this afternoon.

Q. Where is his headquarters?

A. In New York City, New York.

Q. What was this communication?

A. Advising us of the results of a discussion between the General Counsel of Jehovah's Witnesses and the entire Executive Staff of the Selective Service at Washington, and as a result of that conference it was ruled that Jehovah's Witnesses possessing the credentials of ordination and serving as ministers of religion for Jehovah's Witnesses were entitled to exemption as regular or ordained ministers, or as IV-D.

Q. In connection with the receipt of that information did you give any instructions to Mr. Hopper?

A. Not until he came to me and stated his case before me and asked what his position was. He stated to me it was the will of Almighty God that he preach the gospel, and asked what

(Testimony of Gerald T. Bigaouette.)

steps he should take to continue preaching that message.

Q. When and where was it you had your conversation with Mr. Hopper, to the best of your recollection?

A. I would say about four weeks ago, first. That was after I was first appointed Company Servant of Jehovah's Witnesses.

Q. And that would be about the middle of May?

A. I would say about the last of May.

Q. Where was that conversation?

A. At Camp Verde.

Q. And did you at that time instruct him to change his statement in his questionnaire in order to secure the classification of IV-D?

A. I didn't instruct him, no.

Q. What did you tell him?

A. I told him if he chose to be recognized as IV-D—I informed him of what the General Counsel had informed me in regard to all of Jehovah's Witnesses. Whether he wanted to do that or go to the army was entirely up to him.

Q. Now, at the time of your conversation with him did he state to you what his classification was?

A. He said that it was I-A. He said he registered in his original papers as a conscientious objector and had never received his con-

(Testimony of Gerald T. Bigaouette.)

scientious objector blanks; that as soon as he received his I-A classification he came here and after a discussion with the Board got these papers, and since that time he hadn't heard a thing.

Q. This was in the latter part of May or the first of June, 1941? A. That's right.

Q. The records of this office show his Special Form for Conscientious Objector, DSS Form 47, was executed by him on December 28, 1940 and filed in this office on December 31, 1940. He stated at that time that he had not received the papers in which he claimed to be a conscientious objector?

A. Oh, no. He stated he hadn't received any further classification. He stated to me that he had gotten these papers after his conversation here, after he came after the papers and after he received his I-A classification, but that he hadn't received any further classification since that time.

Mr. Carr: That is all, Mr. Dingman.

ROBERT EARL HOPPER, JR.,

being duly sworn, testified as follows:

By Mr. Carr:

Q. Your name is Robert Earl Hopper, Jr?

A. That is correct.

(Testimony of Gerald T. Bigaouette.)

Q. And your Order number is 217 with the Yavapai County Local Board of the Selective Service? A. That is right.

Q. You prepared and signed and swore to the statements in your questionnaire on November 23, 1940? A. Yes sir, I did.

Q. I hand you the Selective Service questionnaire in your file. Is that your signature?

A. That's it.

Q. Is it a fact in that questionnaire, under Series VIII, relating to ministers or student preparing for the ministry, you made the statements: "I am not a minister of religion. I do not customarily serve as a minister. I have been a minister of the Truth for Jehovah's Witnesses since October '39. I have been formally ordained. If so, my ordination was performed on by God." Are those the statements contained in your questionnaire?

A. Yes sir.

Q. You have heard the statement of Mr. Dingman in regard to advising you that you had the opportunity to change the statement in your questionnaire and make claim as a minister of religion? A. That is right.

Q. And you were instructed by him as the local officer of the organization of Jehovah's Witnesses that you had that opportunity?

A. That is right.

Q. You state that you received notice of

(Testimony of Gerald T. Bigaouette.)

classification as Class I-A sometime in December, 1940, and that then you filed your Affidavit on DSS Form 47, Special Form for Conscientious Objector, subscribed and swore to the same on the 28th day of December, 1940?

A. That is correct.

Q. This is your signature on this affidavit in your file? A. Yes sir.

Q. Now, you claimed that you did not receive a notification of classification as IV-E by this board? A. That is true.

Q. You further stated you received a communication from Washington in regard to the regulations in camps to be established for conscientious objectors? A. Yes, I did.

Q. When did you receive that communication? A. It was in May.

Q. Of 1941? A. 1941, yes sir.

Q. From whom did you receive this?

A. From the Friends Society of America on Civilian Work.

Q. And that was addressed to you personally? A. Yes sir.

Q. And what, generally, were the contents of that communication and the regulations or instructions you received?

A. Well, they were similar to my general Selective Service blank, as to what kind of work I could do or do better than other work, and the things that were needed in camp, which

(Testimony of Gerald T. Bigaouette.)

church I belonged to, and such matters as that.

Q. And this all related directly to classification of persons as conscientious objectors and anticipated their being sent to Government camps?

A. That is true.

Mr. Carr: Have you gentlemen any further questions?

Mr. Berg: Yes, I would like to know what he did with the information he got.

A. I sent it straight back to Washington without signing it.

Q. In other words, you disregarded it?

A. In other words, I sent a notice with it that I had not received any classification and sent it back without signing any name. I signed my name to the slip but not on the questionnaire.

Mr. Seares:

Q. Doesn't it appear to you if you had not received any classification after you filled out your conscientious objector questionnaire it was up to you to contact this office as to why you had not received one?

A. In a way I did, and in a way I didn't.

Q. In other words, you were not interested enough in your classification to find out?

A. I figured it was up to the Board to notify me of this classification after my conscientious objector papers had been returned to this office.

(Testimony of Gerald T. Bigaouette.)

Q. Those were returned in December?

A. That is true, and I never received a classification card.

Q. Didn't you think it was up to you to find out from the Board why you had not received notice of your classification?

A. In a way I did.

Mr. Berg:

Q. When did you receive your notice to go to camp?

A. I received it last Saturday, the 14th. It was mailed June 11th and I received it June 14th, on Saturday.

Mr. Carr:

Q. You received your questionnaire from this office, did you, Mr. Hopper?

A. That is true.

Q. You received your Notice to Appear for Physical Examination?

A. That is true.

Q. You received your Notice of Classification as I-A?

A. That is true.

Q. You received your Special Form for Conscientious Objector from this office?

A. That is true.

Q. You received your Notice to Report for Induction?

A. That is true.

Q. And they all came within two or three days after mailing from this office?

A. That is true.

(Testimony of Gerald T. Bigaouette.)

Mr. Seares:

Q. Did I understand you to say you had to come in to this office to get your forms for conscientious objector? A. That is right.

Q. In other words, that was not sent through the mail? A. No.

Mr. Berg:

Q. How long after you received your questionnaire and filled it out as a conscientious objector did you wait to come in to the office to get the form?

A. Why, I notified this office and wrote them to send it down. I wouldn't say for sure, but it was no doubt ten days.

Q. In other words, you did not wait very long?

A. I waited as long as the time I am given by the Board to act. They are supposed to be sent out with your general questionnaire.

Mr. Seares:

Q. In other words, how long after you received your classification of I-A was it before you came in to ask for the form for conscientious objector.

A. I wrote in right after that. I don't remember how long.

Mr. Carr: The record shows that the classification of I-A was made on December 7, 1940, and that the Affidavit of Conscientious Objector was filed on December 31, 1940. I don't find anything——

(Testimony of Gerald T. Bigaouette.)

Mr. Berg: In other words, there is no request filed about a conscientious objector form?

Mr. Carr: Oh, yes, there is a slip here (reading) "Please send me blanks for conscientious objectors."

Q. Mr. Hopper, to sum up the whole situation, you are making your claim now as a minister of religion? A. That is true.

Q. And even though you did not receive your notification of classification as IV-E, according to your statement, you were given the opportunity and instructed by Mr. Dingman to change your questionnaire in order that that classification might be made?

A. I was informed but I hadn't heard from the Board and didn't consider it was necessary at that time. My classification hadn't come and I hadn't heard from the Board.

Q. Now, state as briefly as you can what your objection is to going to camp to serve in some non-military work of national importance.

A. We are entirely neutral to the affairs of the world. We are not part of the world and do not believe in joining up with any party religious, political or commercial. All nations are against God and his kingdom. Therefore, we cannot serve two masters.

Q. But you do engage in industry and com-

(Testimony of Gerald T. Bigaouette.)

merce for the purpose of your maintenance and support, do you not?

A. Yes, that is, to make a living, to support ourselves, which is considered other than that, entirely apart from that.

Mr. Carr: That will be all.

CERTIFICATE

I, Nellie G. Prince, Assistant Clerk and stenographer of Yavapai County Local Board of Selective Service, Prescott, Arizona, hereby certify that William Robert Dingman and Robert Earl Hopper, Jr., being first duly sworn by Alfred B. Carr, Chairman of the Board, duly testified before the Local Board of Yavapai County on June 20, 1941; that to the best of my ability I took down in shorthand the questions propounded to them and the answers given by them and transcribed the same. That the foregoing questions and answers so taken down in shorthand and transcribed by me are to the best of my ability, knowledge and belief the questions propounded to the witnesses and the answers given by them.

Dated at Prescott, Arizona, June 24, 1941.

NELLIE G. PRINCE

CERTIFICATE

I, Alfred B. Carr, Chairman of the Local Board of Yavapai County, Selective Service, hereby certify that William Robert Dingman and Robert Earl Hopper, Jr., being first duly sworn by me, testified before the Local Board on June 20, 1941 at Prescott, Arizona. That Nellie G. Prince, Assistant Clerk and stenographer of the Local Board, took down the questions propounded to said witnesses and the answers given by them and transcribed the same. That I have read the foregoing transcript of the testimony, and to the best of my recollection, knowledge and belief the same contains the questions propounded to said witnesses and the answers given by them.

Dated at Prescott, Arizona, June 24, 1941.

ALFRED B. CARR

Chairman of the Board

Thereupon the witness,

HARRY F. DISE,

was sworn on behalf of the Government and testified as follows:

“A. I am presently employed as clerk of the Yavapai County Local Board, Selective Service System.

(Testimony of Harry F. Dise.)

Q. And when did you enter that employ?

A. On the 1st day of January, 1941.

Q. And you have been continually in that position since then? A. Yes, sir.

Q. And your duties—what are your duties as such? [56]

A. Well, the duties of the clerk of the local Board is, under the regulations, made custodian of the records of the office and he supervises the routine office work.

Q. And when you went in there you took over the records that formerly had been in the custody and kept by Mr. Bigaouette?"

Thereupon the plaintiff offered in evidence the following paper, being Government's Exhibit No. 3:

GOVERNMENT'S EXHIBIT No. 3

"To be filled out in ink or on typewriter
SELECTIVE SERVICE QUESTIONNAIRE
Order No. 217

Date of mailing November 19, 1940

Yavapai County Local Board

P. O. Prescott, Arizona

Name

Robert	Earl	Hopper, Jr.
(First)	(Middle)	(Last)

NOTICE TO REGISTRANT

You are required by the Selective Training and Service Act of 1940 to fill out this Ques-

(Testimony of Harry F. Dise.)

tionnaire truthfully and to return it to this Local Board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire must be returned on or before November 24, 1940.

HARRY F. DISE

Member of Local Board

INSTRUCTIONS

This Questionnaire is intended to furnish the Local Board with information to enable it to classify you in one of the following Selective Service Classes.

Class I includes men who are available for induction into the armed forces of the United States.

Class II includes those whose induction is deferred because of the importance to the Nation of the service they are rendering in their civilian activities.

Class III includes those whose induction is deferred because they have persons dependent upon them for support.

Class IV includes those whose induction is deferred by law and those unfit for military service.

You will receive notice from your Local Board of your classification.

(Testimony of Harry F. Dise.)

Oaths required in the Questionnaire may be administered by (1) a member or chief clerk of a Local Board or Board of Appeal member or associate member of an Advisory Board for Registrants, or a Government Appeal Agent; (2) any Postmaster, Notary Public, or any Federal, State, county, or municipal officer authorized by law to administer oaths generally or for military purposes. No fee should be charged for this service.

Advisory Boards for Registrants are organized to assist registrants in completing their Questionnaires. No charge will be made for this [57] service. If there is no Advisory Board available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the executive head of the institution shall communicate these facts immediately to the Local Board.

1. Make no alterations in the printed matter in this questionnaire.

2. Write the applicable words in the spaces provided in the Questionnaire.

3. If you furnish additional information or affidavits with your questionnaire, attach the same securely to it.

4. If you are already in the active military or naval service, obtain a certificate to that

(Testimony of Harry F. Dise.)

effect from your commanding officer and attach same to your Questionnaire.

5. After this Questionnaire has been returned, report to your Local Board at once any change of address or any new fact which may affect your classification.

When a notice affecting you is posted at the office of your Local Board, you are bound to perform the duty required even if no notice reaches you by mail.

Any statements in this Questionnaire marked (Confidential) are for information only of the officials duly authorized under the regulations to examine them.

D.S.S. Form 40

Yavapai County Local Board

Nov. 27, 1940

P.O. Bldg. Prescott, Arizona.

Statements of the Registrant

Series I.—Identification

Instructions.—Every registrant shall fill in all statements in this series.

1. My name is

Robert

Earl

Hopper

(First name) (Middle name) (Last name)

2. In addition to the name given above, I have also been known by the names of.....

3. My residence is Camp Verde Yavapai
Arizona

(Testimony of Harry F. Dise.)

3. My residence is (Town—City, town or village) Camp Verde (County) Yavapai (State) Arizona.

4. My telephone number is none

5. My social security number is none

Series II.—Physical Condition (Confidential)

Instructions.—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I have no physical or mental defects or diseases. If so, they are

2. I am not an inmate of an institution. If so, its name is

Series III.—Education

Instructions.—Every registrant shall fill in all statements in this series.

1. I have completed 8 years of elementary school and 4 years of high school.

2. I have had the following schooling other than elementary and high school:

Name of Vocational School, College, University of Arizona Study Agriculture Length of time attended 11½ years

Series IV.—Occupation or Activity.

Instructions.—All registrants shall fill in Statement No. 1 in this series [58] except No. 9. Every registrant who is now prevented from working merely because of some seasonal or temporary interruption shall fill in all state-

(Testimony of Harry F. Dise.)

ments except statements numbered 2 through 8 in this series.

As used in this series, words such as occupation, work, and job apply to services rendered in any endeavor and to training or preparation for any endeavor.

1. I am working at present.

2. The job I am working at now is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, medical student, policeman, marriage license clerk, etc.):

Farm laborer and Cattle Raiser

3. I do irrigating, work in hay, brand cattle.

4. I have done this kind of work for five years

5. My average earnings per week are \$25.00

6. In this job I am an employee, working for a salary.

7. My employer is Earl Hopper, Camp Verde, Arizona, whose business is farming.

8. Other business or work in which I am now engaged is none.

9. If you are not now working because of some seasonal or temporary interruption, attach to this page a statement (a) explaining what the interruption is, when it began, and when you expect to be able to resume your work, and (b) supplying substantially the same in-

(Testimony of Harry F. Dise.)

formation regarding your last job as is required in the above items in this series.

10. I am not licensed in a trade or profession; if so, I am licensed as.....

11. I am not at present an apprentice under a written or oral agreement with my employer.

12. Other facts which I consider necessary to present fairly the occupation which I have described, or my connection with it, as a ground for classification are (if none, write "None"): none.

Instructions.—You may attach to this page any statement from your employer which you think the Local Board should consider in determining your classification. Such statement will then become a part of this Questionnaire.

Series V.—Other Occupational Experience.

Instructions.—Every registrant shall fill in this statement. Include any formal apprenticeship served.

1. I have also worked at the following occupations other than my present job, during the last 5 years: (if none, write "None")

Occupation	Kind of work done	Years worked
None		

Series VI.—Agricultural Occupations.

Instructions.—Every registrant who works on a farm shall fill in this series, in addition to filling out Series IV and V above.

(Testimony of Harry F. Dise.)

1. I work on or operate a farm as—Wage hand (hired man)

2. I have farmed for 5 years.

3. I do live on the farm with which I am connected.

4. I am actually and personally responsible for the operation of the farm on which I work.

5. The principal crops and livestock of the farm I operate or work on are:

Name of Crops	Acres devoted to each	Kind of Livestock	No. of Each Now on farm
Alfalfa, grain	15 A Alfalfa		20
pasture	40 A grain	<i>Herford</i> Cattle	180 on range.
			[59]

6. The number of hands employed on this farm is one.

7. Other facts which I consider necessary to present fairly the agricultural enterprise I have described and my connection with it as a ground for classification are None.

Series VII.—Dependency (Confidential except as to names and addresses of claimed dependents.)

Instructions.—Every registrant shall fill in the statements numbered 1, 2 and 3 in this series.

1. (a) I am single (b) If married, I married my present wife at..... Series VII.

(Testimony of Harry F. Dise.)

2. I have none children who are under 18 years of age or are physically or mentally handicapped, and who live with me.

“Dependent”. As used in this series defined.

The word “dependent,” as used in this series, means any person to whose support the registrant contributes more than merely a small part of such person’s support (or to whose support the registrant would contribute were he not temporarily prevented from so doing by the registrant’s physical or economic situation) who is either (a) the registrant’s wife, divorced wife, parent, foster parent, or grandparent, or (b) the registrant’s child, unborn brother, half-brother, sister, or half-sister who is under 18 years of age or is physically or mentally handicapped, or (c) a person whose support the registrant has assumed in good faith, who is either under 18 years of age or is physically or mentally handicapped.

Only a person who is a United States citizen or who lives in the United States or its Territories or possessions may be regarded as a dependent.

Based on the information contained in this Questionnaire and on other information which the Local Board may receive, the Local Board will determine whether the “dependent” is an individual who is dependent in fact for support in a reasonable manner in view of such indi-

(Testimony of Harry F. Dise.)

vidual's circumstances on income earned by the registrant by his work in a business, occupation, or employment.

Instructions.—Only those registrants who believe that one or more persons are dependent for support on the registrant's earnings from his work are required to fill in the statements numbered 3 through 12 in this series.

3. The following persons live with me in a home maintained by me and are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other source of income except as stated below.

None.

The net cost to me of maintaining my home during the last 12 months, after deducting \$..... contributed by other than myself for the support of such dependents was \$.....

4. The following persons do not live with me in a home maintained by me, but are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other source of income except as stated below.

None. [60]

5. The cause of the dependency of any persons over 18 years of age (excluding my wife) listed above is as follows: (Give the name and

(Testimony of Harry F. Dise.)

a full statement of cause for dependency in each case.) None.

6. Of my dependents, only the following are receiving a part of their support from persons other than myself. (Give name of dependent, name and address of other person or agency contributing to his support, and amount so contributed in cash or other things of value by such other person or agency during the last 12 months.)

7. Of the amounts contributed by me to dependents listed above only \$..... contributed to..... was in payment for my own board and/or lodging.

8. The income I earned from my work in my business, occupation, or employment during the past 12 months was \$.....

9. My income from all other sources during the past 12 months was \$.....

10. The following is a list of all property owned by (or held in trust for) either me or my dependents, the value of such property, and the net income received by either me or my dependents from such property during the past 12 months: (List this information separately as to the registrant and each dependent. Do not include clothing, personal effects or household furnishings; or cash less than \$500. Indicate which of such property is your home.)
None.

(Testimony of Harry F. Dise.)

11. I do not rent the house in which I live. If so, the monthly rent is \$....., and the name and address of my landlord is Earl Hopper.

12. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are: None.

Instructions.—With respect to any dependent (other than the registrant's own wife, child, parent, or grandparent) whose support the registrant has assured, attach to this page a statement explaining why and under what circumstances the registrant assumed such person's support. Such statement will then become a part of this Questionnaire.

Supporting Affidavit of Dependents Over 18 Years of Age.

Instructions.—If convenient, each dependent over 18 years of age except the registrant's wife shall swear to (or affirm) the following affidavit. The registrant shall furnish the Local Board a separate affidavit from each such dependent who does not sign the affidavit below. Blanks for this purpose will be supplied by the Local Board on request.

State of County of

We the undersigned do solemnly swear (or affirm) each for himself and herself individu-

(Testimony of Harry F. Dise.)

ally, that we have read or had read to us the foregoing statements under the heading "Dependency" that we understand the same; that we are named as dependents; that the statements contained therein as to the name, age, residence, relationship, and dependency of each of us toward said registrant, and the statements of his contributions and the contributions by other persons to the support of each of us and the statements of the financial and material condition of each of us, and of the income of each of us from all sources, are true.

.....
(Signature of dependent)

.....
(Signature of dependent) [61]

Subscribed and sworn to before me this
day of 19

.....
(Signature of officer)

.....
(Designation of officer)

Series VIII.—Minister, or Student Preparing
for the Ministry.

Instructions.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

(Testimony of Harry F. Dise.)

1.(a) I am not a minister of religion.

(b) I do not customarily serve as a minister.

(c) I have been a minister of the Truth for Jehovah's Witnesses since October 39.

(d) I have been formally ordained. If so, my ordination was performed on by God at

3. I am not a student preparing for the ministry in a theological or divinity school.

4. I am attending the which was established September 16, 1939, and is located at.....

Series IX.—Citizenship

Instructions.—Every registrant shall fill in the statements numbered 1, 2, 3 and 4 of this series.

1. I was born at (Town) Garden Grove California (Country) United States.

2. I was born on October 8, 1918.

3. My race is White.

4. I am a citizen of the United States.

Instructions.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, 7, 8, 9.

5. I a citizen or subject of

6. My permanent residence has been in the United States since.....

(Testimony of Harry F. Dise.)

7. I filed a declaration of intention to become a citizen of the United States (first papers). Declaration filed at on under No.

8. I filed a petition for naturalization (second papers). Petition filed at on

9. I registered with the Alien Registration Division, United States Department of Justice, under Alien Registration Act of 1940. Registration receipt card number, if received [62]

Series X.—Conscientious Objection to War.

Instructions.—Only registrants who are conscientiously opposed to combatant or noncombatant military service by reason of their religious training and belief shall fill in this series, and shall obtain from the Local Board a special form on which to give substantiating evidence of conscientious objection. The Local Board will determine whether the registrant shall be classed as a conscientious objector on the basis of the claim made and the information contained in the special form.

I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed, by reason of my religious training and belief, to the type or types of service checked below.

X Combatant military service

X Noncombatant military service.

(Testimony of Harry F. Dise.)

Series XI.—Court Record (Confidential)

Instructions.—Every registrant shall fill in statement Number 1.

1. I have not been convicted of treason or a felony.

Instructions.—Every registrant who has ever been convicted of such an offense shall fill in the statements numbered 2, 3, and 4.

2. The offense was.....

3. The approximate date of conviction was

.....
(Month) (Day) (Year)

4. The name and location of the court was
(Name)

Series XII.—Military Service (Confidential)

Instructions.—Every registrant who now is or has been a member of the armed forces of the United States shall fill in the statements in this series. (Use a separate line for each term of service.)

My military service has been as follows: Arm of Service: None.

Series XIII.—Students, Present Members of Armed Forces, Certain Officials, etc.

Instructions.—Every registrant who is a member of one or more of the groups named in this series shall check the appropriate item

(Testimony of Harry F. Dise.)

or items, and shall supply any further information called for under the item or items checked.

I am at present:

A college or university student, having entered upon attendance for the academic year 1940-41 at (Name of College) On 1940.

This college or university is located at I am pursuing a course of study involving hours of attendance per week leading to the (Name of Degree or Certificate). I request that if I am selected for training, my induction be postponed until the end of the present academic year, which ends on (Month) 1941.

A commissioned officer, warrant officer, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, the Public Health Service, the federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the [63] Enlisted Reserve Corps, the Naval Reserve, or the Marine Corps Reserve; my rank or commission is in the (Name of Service)

A cadet, United States Military Academy; midshipman, United States Naval Academy; cadet, United States Coast Guard Academy; man who has been accepted for admittance

(Testimony of Harry F. Dise.)

(commencing with the academic year next succeeding such acceptance) to the United States Military Academy as cadet, to the United States Naval Academy as midshipman, or to the United States Coast Guard Academy as cadet, and whose acceptance is still in effect; cadet of the advanced course, senior division, Reserve Officers' Training Corps or Naval Reserve Officers' Training Corps; I am (A cadet, midshipman) (or accepted for admittance) in (Name of corps, academy, etc.).

The Governor of a State or Territory, a member of a legislative body of the United States or of a State or Territory, a judge of a court of record of the United States or of a State or Territory or the District of Columbia; my office is

Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it which should be taken fully into consideration regardless of whether or not this statement is filled in.

(Testimony of Harry F. Dise.)

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class (See Instructions Page 1).

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the Local Board in determining his classification.

I am one of Jehovah's Witnesses and as such I am entirely neutral to the affairs of this world, based on the booklet "Neutrality."

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

State of Arizona,
County of Yavapai.

I, Robert Earl Hopper Jr., do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire, that I have read (or have had read to me) the statements made by and about me, and that each and every such

(Testimony of Harry F. Dise.)

statement is true and complete to the best of my knowledge, information and belief.

Registrant sign here:

ROBERT EARL HOPPER JR.

Subscribed and sworn to before me this 23 day of Nov. 1940.

JESSIE STEPHENS

(Signature of Officer)

Postmaster

(Designation of Officer)

[64]

If the registrant has received assistance from an advisor, the latter will sign the following statement:

I have assisted the registrant herein named in the preparation of this Questionnaire.

FERN HOPPER

Advisor.

Instructions: Registrant shall write nothing below this line when filling out the Questionnaire.

Minute of Action on Request for Extension of Time for Filing Claim or Proof.

The application of.....to have time for filing claim or proof extended to.....19.....
(granted) for the reason that.....
(refused)

.....
(Date)

.....
(member)

(Testimony of Harry F. Dise.)

Minute of Action by Local Board

The Local Board classified the registrant in Class I, Subdivision A, by the following vote:
Ayes 3 Noes 0.

December 7, 1940

(Date)

ALFRED B. CARR

Member.

Appeal to Board of Appeal.

I hereby appeal from the classification by the
Local Board in Class....., Subdivision.....

.....

(Date)

.....

(Signature of person appealing)

Instructions.—You must also attach here a written statement specifying the class or classes in which you think you should be placed. If you wish the appeal board to review a determination regarding your physical or mental fitness, you must fill out and sign the form for appeal on the Report of Physical Examination (Form 200) and you must attach to that form a statement specifying the class or classes in which you think you should be placed.

Minute of Action by Board of Appeal

The Board of Appeal classifies the registrant in Class..... Subdivision..... by the following vote: Ayes..... Noes.....

Date.....

.....

Member

(Testimony of Harry F. Dise.)

I Hereby appeal to the President from classification by the Board of Appeals in Class....., Subdivision..... Certificates and recommendations required by section 379 S.S.R., are attached.

.....
(Date)

.....
(Signature of person appealing)

[65]

Minutes of Other Actions

Dates

January 3, 1941 Classification of Dec. 7, 1940, made before receipt of Form 47. On this date reclassified as IV E by vote of 3 Ayes, 0 Noes.

ALFRED B. CARR.

January 7, 1941 Report from Appeal Agent indicates that Jehovah's Witnesses and recognized sect opposed to war in all forms.

J. H. MORGAN.

And the said witness, Harry F. Dise, testified thereto as follows:

"Q. I show you now Government's Exhibit No. 3 for Identification and ask you if this is one of the records which you took over at that time?

A. Yes, sir; that record was in the file when I took over.

(Testimony of Harry F. Dise.)

Q. Now, I will ask you to examine this exhibit for identification and state whether or not there were any entries made on that after you had charge of the office and had charge of those records?

A. Well, this entry on Exhibit 1, on page 1——

Q. (Interrupting) When was that made, do you recall?

A. That, I think, was made at the time of the preliminary hearing in this case.

Q. That was the identification mark before the Commissioner?

A. Yes, sir; before the Commissioner in Prescott. On the last page of this questionnaire, the minute action of the local Board of December 7th, 1940, the minute action, that was on there when I took over, but the minutes of other actions of January 3d, 1941, and January 7th, 1941——

Q. (Interrupting) All right, now referring to January 3d, 1941. Do you know who made that entry?

A. That entry was made by the chairman of the Board, Alfred B. Carr, at a meeting of the local Board.

Q. And the next entry of December 7th, 1941, by whom was that made?

A. That was made by Mr. Morgan, who is also a member of the local Board.

(Testimony of Harry F. Dise.)

Q. And these are in their respective handwriting, is that right? A. Yes, sir.

Q. And that is a part of this record and is a part of the permanent records kept there in the office? A. Yes, sir.

Mr. Flynn: We now offer Government's Exhibit No. 3 in evidence.

Mr. Clark: Well, we object to it until it be shown—unless it be shown it is the questionnaire signed by the defendant and in some way connected up with the defendant in this case, your Honor. We say that it is [66] not competent and without in some way connecting it with this defendant.

The Court: It may be received.

(The document was received as Government's Exhibit 3 in evidence.

Mr. Clark: May we have an exception?

The Court: Yes."

Thereupon the plaintiff offered in evidence the following:

"GOVERNMENT'S EXHIBIT 2-B,
being all of Government's Exhibit 2, hereinbefore set out and not introduced as a part of Government's Exhibit 2, or Government's Exhibit 2-A."

And the witness, Harry F. Dise, testified thereto as follows:

"Mr. Flynn:

Q. Now, Mr. Dise, calling your attention to

(Testimony of Harry F. Dise.)

Government's Exhibit 2A in evidence, does the line following the number 217 under the name of the registrant, Robert Earl Hopper, I will ask you to follow that line through and see if there are any entries made in this record, made by you or under your direction while you were in charge of the records of that office?

A. On this line, the first entry I made was following number 217. I didn't put the number in, but following that is a small "s" in pencil which has no affect whatever, of course, upon his classification, and it is just the manner that I make notations with in pencil in order to make periodical reports to our State headquarters. It is just a key for me to follow in making these reports. I drew a red line through the "X".

Q. That is Column 13-A?

A. Yes, sir; and at the same time inserted in Column 13 under "4" the letter "E".

Q. What was the purpose of that entry; what does it indicate?

A. Well, it indicates a re-classification as made by the local Board.

Q. From class 1-A to what?

A. To class 4-E.

Q. And that is the conscientious objector classification?

A. Yes, sir; and I likewise posted under Column—in Column 16 the figures "1-3-41",

(Testimony of Harry F. Dise.)

and in Column 28, in red, I have posted "re-classified", and abbreviated it, "1-3-41".

Q. And that indicates the date of the re-classification? [67]

A. That indicates the date in which the notice of this new classification or re-classification was mailed to the registrant.

Q. Have you any records of that notice?

A. The records are contained in that——

Q. (Interrupting) This is the record (indicating document)?

A. That is the record required under the Selective Service Law and the regulations thereunder.

Mr. Flynn: At this time, your Honor, we wish to offer in evidence the balance of the line which has been marked as Government's Exhibit 2A in evidence, those entries which this witness has just testified that he made, and in connection with that I'd like to also offer as a part of this exhibit the headings to the columns and the heading and title of the document "Classification Record, Local Board for Yavapai County, Arizona", the page numbers and the column headings together with the entire line which has been marked, a part of it now in evidence as Government's Exhibit 2A.

Mr. Clark: We make the same objection that we made as to the balance of the record, your Honor.

The Court: It may be received.

Mr. Clark: Note an exception."

Thereupon, on said 27th day of March, 1942, the plaintiff having rested, the defendant made the following motion, to-wit:

"Mr. Clark: The defendant respectfully moves the Honorable court to direct the jury to return a verdict of not guilty upon the following grounds: One, that the indictment is totally defective, that it does not charge a public offense or crime; two, that the statute upon which this action is based, to-wit: Title 50, Section 301, and those sections following 301 to 311 of Title 50, is unconstitutional and void, in that it violates the First Amendment to the United States Constitution, in that it places a penalty on religion and prohibits the free exercise of religion, and in that said statute violates the 5th Amendment to the U. S. Constitution, in that upon its face and as construed and applied, said statute deprives defendant of liberty and property without due process of law; that said act on its face and as construed and applied violates the 13th Amendment to the constitution of the United States, in that it subjects the defendant to involuntary servitude not as punishment for crime, and upon the further ground that said statute attempts, unlawfully, to delegate legislative powers to private, non-governmental agencies, or to private indi-

viduals. And upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard to a non-judicial tribunal. Three, that no public offense has been proved, nor has any crime been proved against this defendant."

Thereupon, the court made the following ruling upon the foregoing motion for a directed verdict:

"The Court: The motion will be denied. Call in the jury.

Mr. Clark: Exception, please." [68]

The defendant presents the foregoing as his proposed Bill of Exceptions in the above entitled matter, and prays that the same may be settled and allowed.

Dated this 11 day of May, 1942.

CHARLIE W. CLARK,
Attorney for Defendant
1930 W. Adams Street,
Phoenix, Arizona.

The foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated: May 14, 1942.

FRANK E. FLYNN,
United States Attorney,
Frank E. Flynn.

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

Dated: May 15, 1942.

DAVE W. LING

Judge of the United States
District Court.

[Endorsed]: Filed May 15, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [69]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

In the United States District Court
for the District of Arizona.

United States of America
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Robert Earl Hopper, Defendant, numbered C-6163 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 70, inclusive, contain a full, true and cor-

rect transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Defendant's Praecipe on Appeal filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, except the Reporter's Transcript and all exhibits offered or admitted in evidence at the trial of this action.

I further certify that the duplicate reporter's transcript, and a certified copy of Government's Exhibits 2, 2A and 2B, and all original exhibits except said exhibits 2, 2A and 2B, offered or admitted in evidence, are transmitted herewith pursuant to the order of the court entered May 26, 1942.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$13.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 29th day of May, 1942.

(Seal)

EDWARD W. SCRUGGS,

Clerk

By WM. H. LOVELESS,

Chief Deputy Clerk. [71]

[Endorsed]: No. 10110. United States Circuit Court of Appeals for the Ninth Circuit. Robert Earl Hopper, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed June 1, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10110

UNITED STATES OF AMERICA,

vs.

ROBERT EARL HOPPER JR.,

Defendant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL.

The Appellant relies upon the assignments of error appearing in the transcript of the record as the Statement of Points on which Appellant intends to rely on Appeal and hereby refers to said Assignments of Error as appearing in said transcript and

adopts the same as his Statement of Points on which Appellant intends to rely on appeal and incorporates the same herein, at this point, by reference as though set out herein in full.

CHARLIE W. CLARK

Attorney for Appellant.

Copy received June 8, 1942.

F. E. FLYNN

U. S. Atty.

[Endorsed]: Filed Jun 10 1942. Paul P. O'Brien,
Clerk.

No. 10110

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United States
for the District of Arizona**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, December
6, 1943.

Before: Wilbur, Garrecht, Denman, Stephens and
Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. E. S. Clark,
counsel for appellant, and by Mr. Frank E. Flynn,
United States Attorney, counsel for appellee, and,
pursuant to oral stipulation of said counsel, sub-
mitted To Wilbur, Garrecht, Denman, Mathews,
Stephens and Healy, Circuit Judges, for considera-
tion and decision, with leave to counsel for respec-
tive parties to file further briefs 10 X 10.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings Monday, December 6,
1943.

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS,
AND FILING AND RECORDING OF
JUDGMENT

By direction of the Court, Ordered that the type-written opinion, concurring opinion, and dissenting opinion, this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United
States for the District of Arizona

OPINION, CONCURRING OPINION AND
DISSENTING OPINION

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens, and Healy,
Circuit Judges.

Healy, Circuit Judge

This appeal is from a judgment of conviction under §11 of the Selective Service and Training Act of 1940, 50 USCA §311. On an earlier hearing, in an unreported opinion, the judgment was reversed on the ground of the insufficiency of the indictment. A rehearing was granted and the case was again argued, this time before the court sitting en banc. In view of the different result now reached we deem it advisable fully to recite the facts and to state our conclusions somewhat more at length, perhaps, than the gravity of the questions justifies.

Appellant is a native born citizen of the United States, and at the time of his registration under the Selective Service Act in October, 1940, he was twenty-two years old. He was then residing in Yavapai County, Arizona, of which Prescott is the county seat. On November 19, 1940, he filed with the Selective Service Board at Prescott his questionnaire showing the above facts and describing himself as a farm laborer and cattle raiser and as

being unmarried and without dependents. In the questionnaire he stated that he is not a minister of religion and does not customarily serve as a minister, but that he is one of Jehovah's Witnesses and as such is entirely "neutral to the affairs of this world."

He was directed to report for physical examination, was examined, and was found fit for general service. He was thereupon, on December 7, 1940, placed in Class 1-A and was so notified. A short time later, at his request, he was furnished with a conscientious objector form, which he filled out and returned to the board under date of December 31, 1940. In this report he again described himself as one of Jehovah's Witnesses and as neutral in mundane affairs. He did not assert that he was a minister, but claimed only exemption from service under direction of the military because conscientiously opposed by reason of his religious belief to participation in war in any form. Under date of January 20, 1941, in line with the registrant's own report, the local board reclassified him, placing him in Class IV-E, that is to say, in the category described in §5(g) of the Act as one assignable to work of national importance under civilian direction. Notice of this classification was mailed him at the time.

In May 1941, the National Director of the Selective Service System directed appellant's assignment to work of national importance in the civilian camp at Glendora, California. On June 11, 1941, an order to report for such duty, entitled in the name of the President of the United States and signed by a

board member, was mailed him.¹ The date specified for his appearance was June 22, 1941, at 8:00 P. M. Appellant, in response to the notice, went to Prescott, contacted the board on June 19, and advised its members that he wished to appeal his classification on the ground that he was a minister, although he appears to have made no claim that his status in this respect had changed since the date of his registration. He was told, according to his own testimony, that he had waited too long and was not entitled to an appeal.² He claimed, however, that he had not received the notice of his IV-E classification mailed him in January.³

Next day, June 20, 1941, he appeared before the board and the members thereof interrogated him, apparently for the purpose of satisfying themselves whether there was any ground for considering his claim to be a minister and to determine his good faith or the lack of it.⁴ Appellant's statements

¹This order recited that he had been classified as a conscientious objector, Class IV-E.

²Under the then regulations an appeal from a classification was required to be taken within ten days.

³Regulation 601.158, Code of Federal Regulations [1940 Supplement, p. 4415], provides in part as follows: "The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication whether he actually receives it or not."

⁴There is no reason for cataloging this inquiry as a proceeding for reclassification under the regulations, and it is abundantly clear that the board did

made at that time were taken by a stenographer and the transcribed questions and answers were introduced as an exhibit upon the trial of the case, forming part of the record here. In response to questioning by board members appellant, without further explanation, admitted having stated in his questionnaire that he was not and did not serve as a minister. While continuing to deny receipt of the notice of his IV-E classification he admitted having received all other communications directed to him by the board. He admitted that in May 1941 he had received from a Quaker organization in Washington a letter concerning his prospective service in the civilian camp, but had disregarded it. He admitted also having been told in May by a company servant of Jehovah's Witnesses that he might by changing his questionnaire be classified as a minister. This suggestion, too, he admitted having disregarded. From his story the board was warranted in believing not only that he was trifling with the truth when he denied knowledge of his IV-E classification, but that his present claim to exemption as a minister was a mere pretense.

On June 22, 1941, at the hour specified in the order requiring appellant to report, he presented himself to the board's administrative officer who again instructed him that it was his duty to go to

not so regard it. Appellant has at no time contended that the hearing effected a vacation or suspension of his existing classification. It was the position of his counsel on the trial that the board arbitrarily denied his claim to be classed as a minister.

the Glendora camp. His transportation and means for obtaining meals on the journey were tendered him but he declined to accept them, stating that he was appealing his case to state and national authorities and was not going to camp. It appears to have been his position then, as it was later at the trial, that he had the right to disobey while presently appealing from a classification made five months before at his own request. In sum, he undertook to formulate his own rules of procedure and to be the judge of his own case.

Thereafter the board brought the matter to the attention of the United States attorney, and appellant was indicted, tried, and convicted under §11 of the Act providing that "any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty," shall upon conviction be punished, etc.

We append the indictment in full in the footnote.⁵

⁵"The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that Robert Earl Hopper, having theretofore registered under the Selective Training and Service Act of 1940, on or about or about the 22nd day of June, A. D. 1941, and within the said District of Arizona, did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant thereto, that is to say, that the said defendant, Robert Earl Hopper, having been theretofore classified by his local draft

Appellant moved to quash and later moved for a directed verdict, both times on the ground of the insufficiency of the indictment and the unconstitutionality of the Selective Service Act. The record shows that but one specific ground of insufficiency was urged upon the trial court. We quote this objection on the margin in the language of appellant's then counsel.⁶ The only specifications of insufficiency made in the brief here were (a) that the term "his local draft board," as employed in the indictment, carried no legal meaning; and (b) that the indictment was defective in that it did not state when, where, or to whom the defendant was to report. However, the accused made no demand for a bill of particulars, and it is clear that he experienced no difficulty in understanding the charge and that he suffered no prejudice.

board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowingly, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

⁶On the motion for a directed verdict, counsel stated: "Now, on the matter of the first motion, that the indictment fails to state a public offense or crime as set out in the motion to quash, but the motion to quash is not reviewable, so I make the same argument at the time that was made; that is, that the indictment is so indefinite, that it does not charge a public offense; that it does not say to whom he was required to report, nor by whom he was ordered to report and all of the elements of a faulty indictment are present in this indictment."

The indictment charged the crime in the language of the statute, with particulars of the direction given and disobeyed and the time and place of the disobedience. We think the essential elements of the offense are stated, if not directly, certainly by implication. In *Crutchfield v. United States*, . . F. 2d . . , we held good, in the absence of objection, an indictment less specific, perhaps, than the present. And in *United States v. Messersmith*, . . F. 2d . . , November 11, 1943, the Court of Appeals of the Seventh Circuit held sufficient an evidently similar indictment saying: "Defendant contends that the indictment is vague and uncertain. It charges that defendant was duly assigned to work of national importance under civilian direction; that the Board directed him to report for such service and that he knowingly, intentionally and willfully failed to comply. This is a valid averment of violation of the law and fully advises defendant of the nature and character of the charge against him."

The courts are admonished by §1025 of the Revised Statutes, 18 USCA §556, that "no indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

At least since *Hagner v. United States*, 285 U. S. 427, the federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations. As said by

the court in that case, p. 431, "the rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him or a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction,' " (citing cases). The court further observed, 285 U. S. p. 433, that "upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

In the Hagner case the defendant was indicted in the District of Columbia for using the mails to defraud. The charge was that in the execution of the fraudulent scheme he had deposited certain mail matter in the United States Post Office in Pennsylvania, addressed to a person in the District of Columbia. The indictment did not state, in conformity with the statute, that he did "knowingly cause [the letter] to be delivered by mail according to the direction thereon." After conviction the defendant moved in arrest of judgment on the ground that while the indictment showed an offense in Pennsylvania, it failed to charge any offense within the District of Columbia. In support of the indict-

ment the court had recourse to the well known evidentiary presumption that a letter, placed in the post office and properly directed, was actually received by the person to whom it was addressed. "While, therefore," said the court (p. 431), "the indictment does not in set terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged." In holding the indictment sufficient, the court cited §1025 of the Revised Statutes, heretofore quoted.

Many holdings of a cognate character, adhering to the mandate of the quoted statute, are cited by the court in the Hagner opinion, among these being *Dunbar v. United States*, 156 U. S. 185; *Olsen v. United States*, 287 Fed. 85; *Cohen v. United States*, 294 Fed. 488; *Gay v. United States*, 12 F. 2d 433; *Musey v. United States*, 37 F. 2d 673; *Phipps v. United States*, 251 Fed. 879; *Stephens v. United States*, 9 Cir., 261 Fed. 590; *Grandi v. United States*, 262 Fed. 123.

As recently as the present year the Court of Appeals of the Fourth Circuit in *Nye v. United States*, 137 F. 2d 73, speaking through Judge Parker, has reviewed the rule of the Hagner case and its own earlier decision of similar import in *Martin v. United States*, 299 Fed. 287. Said Judge Parker in the *Nye* opinion (p. 76): "Following the decision in the *Martin* case we have consistently followed the rule there laid down, sustaining under a variety of circumstances indictments drawn in general terms where they set forth the ingredients of the offense as defined by statute with sufficient definite-

ness and certainty to apprise the defendant of the crime charged and to protect him against further prosecution for the same offense," (citing cases).

Another forceful recognition of the modern rule is found in an opinion of Judge Learned Hand in *United States v. Polakoff*, 2 Cir., 112 F. 2d 888, a prosecution involving a charge of conspiracy to obstruct justice. Said Judge Hand (p. 890): "The indictment merely alleged that the accused conspired 'to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not more than one year and one day.' The challenge is that it should have specified who were the 'officers' that were to be so 'impeded.' We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. Decisions such as *Heaton v. United States*, 2 Cir., 280 F. 697, and *Kellerman v. United States*, 3 Cir., 295 F. 796, are of doubtful service today, when objections which do not go to the substance of a fair trial no longer get much countenance. *Hagner v. United States*, 285 U. S. 427, 431, 52 S. Ct. 417, 76 L. Ed. 861; *Berger v. United States*, 295 U. S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314; *Crapo v. United States*, 10 Cir., 100 F. 2d 996, 1000."

This court, too, has more than once announced the principle stated in the foregoing authorities, and has adhered to the command of the quoted statute. *Woolley v. United States*, 97 F. 2d 258, 261; *Zuziak v. United States*, 119 F. 2d 140, 141. Cf. *Ackerschott*

v. United States, ... F. 2d ..., decided Nov. 11, 1943.

We hold that the indictment is sufficient and that the commission of the offense was amply established.⁷

A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases, 245 U. S. 366; Goldman v. United States, 245 U. S. 474; O'Connell

⁷The bill of exceptions does not contain all the evidence, but we can, in a proper case, under Rule 9 of the Criminal Appeals Rules, order correction of the bill. Ray v. United States, 301 U. S. 158. For that reason we have examined the reporter's transcript of the evidence and the exhibits, which were filed in this court, to ascertain whether a correction of the bill would aid appellant. From such examination it is apparent that it would avail the appellant nothing to have the bill of exceptions amended to include the evidence shown in the transcript. This method of dealing with the problem has been followed for the reason that the parties have referred to the reporter's transcript and in part based their arguments upon it. However, we desire it to be understood that this procedure is not to be taken as establishing a precedent for the use of such a transcript.

v. United States, 253 U. S. 142; United States v. Stephens, 245 Fed. 956; United States v. Herling, 120 F. 2d 236. Congress and the selective service authorities alike have been considerate in their treatment of those possessing scruples against participation in war. Surely it is not expecting too much to require of them that they do civilian work of national importance at a time when their brothers, under the same compulsion, are giving their lives for them and for the Nation. As we have seen, appellant was accorded due process of law. The board did not act arbitrarily, either in classifying him or in directing him to report for service in line with his classification.

Appellant assigns as error numerous rulings on the admission of evidence. His objections were to exhibits comprising his signed questionnaire, his conscientious objector report, and other documents relating to his registration and sufficiently identified as official records of the selective service board. There was no error in admitting these exhibits.

The judgment is affirmed.

Mathews, Circuit Judge (concurring in the result):

Appellant was indicted for violating §11 of the Selective Training and Service Act of 1940, 50 U.S.C.A. §311, and moved to quash the indictment. The motion was denied. Appellant pleaded not guilty and was tried. At the close of appellee's evidence, appellant moved for a directed verdict. The motion was denied. Thereafter appellant introduced evidence, the case went to the jury, and

appellant was convicted, was sentenced and has appealed.

Twelve alleged errors are assigned. Assignment 1 is that the trial court erred in denying appellant's motion to quash the indictment. The denial of such a motion is not reviewable.¹

Assignments 2-11 are that the trial court erred in admitting evidence. These assignments do not, as required by Rule 2(b) of our rules governing criminal appeals, "quote * * * the full substance of the evidence admitted." Hence these assignments need not be considered.²

Assignment 12 is that the trial court erred in denying appellant's motion for a directed verdict at the close of appellee's evidence. Appellant waived the motion by introducing evidence in his own behalf.³

The judgment should be affirmed.

¹Ramirez v. United States, 9 Cir., 23 F. 2d 788, 789; Johnson v. United States, 9 Cir., 59 F. 2d 42, 44; Sutton v. United States, 9 Cir., 79 F. 2d 863, 864.

²Wheeler v. United States, 9 Cir., 77 F. 2d 216, 218; Levine v. United States, 9 Cir., 79 F. 2d 364, 367; Muyres v. United States, 9 Cir., 89 F. 2d 783; Levey v. United States, 9 Cir., 92 F. 2d 688, 692; Waggoner v. United States, 9 Cir., 113 F. 2d 867, 868; Utley v. United States, 9 Cir., 115 F. 2d 117, 119.

³Baldwin v. United States, 9 Cir., 72 F. 2d 810, 812; Sheridan v. United States, 9 Cir., 112 F. 2d 503, 504.

Denman, Circuit Judge, dissenting:

I agree with the majority that it was our duty to examine the transcript of testimony admitted as part of the record upon the stipulation of counsel and quoted from by the appellee in support of its contention that the court had not erred in denying appellant's motion for an instructed verdict because of failure to present showing the offense was committed.

I am unable to agree with Judge Mathews' concurring opinion that we cannot consider, what the Government considered and relied upon on the rehearing, namely, the motion for such an instruction, because it does not appear in the bill of exceptions that the motion was made at the conclusion of the evidence. We have held the exact contrary. In *Bailey v. United States*, 13 F. (2d) 325, in reversing the judgment of the lower court finding the defendant guilty of defrauding the United States, Judge Rudkin's opinion states "We are aware there was no request for an instructed verdict at the close of the testimony, as suggested by counsel; but if *there is no competent testimony to support the verdict of guilty*, and more especially if it *appears affirmatively that no crime has in fact been committed*, the right and duty of this court to order a reversal is not open to question." (Emphasis supplied.)

If there be any group of cases where the requirement of 28 U. S. C. A. 391 to ignore technical defects should be observed, it is in those of the conscientious objectors. The Supreme Court has made clear enough the wrong in the approach of the trial

of Jehovah's Witnesses as if they are all draft dodgers "who should be sent to the front line trenches." A great part of the youth of that religious organization belong to the generation whose adolescence came in the period between the first and second World Wars. That was the period when parents proclaimed "We did not bring our boy into the world to become a soldier." Mothers drilled into their sons the horror of war in which they would have to maim and kill their fellow man.

No doubt draft dodgers hypocritically avail themselves of a pretended acceptance of a religion based upon such principles. However, it is but natural that such a period with such teachings in American families would make the horror and wrong of war a part of the compelling moral convictions of many of their youth.

There is nothing in the evidence of this case to warrant a doubt as to Hopper's sincerity or for the suggestion that he did not tell the truth when he said he had not received a notice of his requested classification. That, under the rule established by the majority, was entirely irrelevant to his guilt. He cannot complain of the failure to receive a notice that he was placed in the very classification for which he applied. In the absence of the judge's instructions it is unfair to Hopper to assume that the judge did not so instruct the jury and hence take from its consideration the question of Hopper's veracity. His testimony at the trial and that of other witnesses that he was a duly appointed minister in his religion and that he had been

preaching its doctrines prior to his application for reclassification as such a minister was not questioned.

It is my opinion that Hopper was entirely justified in his failure on June 22, 1941, to go to the camp to which the board had ordered him. This is because only a registrant in class IV-E is subject to such an order. Before June 22nd, the effective date of the order, that is on June 20th, the board took him from that classification by entertaining his petition for reclassification in IV-D, a minister of religion, and hence subject to no board order. Thereafter they had not classified him "anew" in either IV-D or IV-E as required by the then regulations.

Prior to May 28, 1941, on an application for reclassification the registrant continued in his prior classification during the reclassification proceeding. The regulation appearing at pages 4449-50 of the Code of Federal Regulations, Supplement 1940, Title 32, provides

"§ 603.387 Reconsidering Classifications.

Upon receiving new evidence the local board may at any time before induction reconsider the classification of any registrant. If the local board places the registrant in a different classification the board shall mail a Notice of Classification (Form 57) to the registrant and shall notify the government appeal agent. If the local board refuses to reclassify, after the registrant has requested reclassification because of a change in circumstances, it shall mail a

Notice of Continuance of Classification (Form 58) to the registrant.” (Emphasis supplied.)

About three weeks before June 22nd, when he failed to report, Regulation 603.387 was significantly amended by Executive Order of May 28, 1941, 6 Fed. Reg. 2603. The portion concerning a continuing classification disappeared. Instead, the May 28th Order provided, in Regulation 385, that no classification is “permanent.” 386 gives the board the power to reopen the classification on its own motion. 387 and 387 (b) provide that in such a reclassification proceeding the classification shall be considered “anew” with the same right of appearance as at the original classification and its “determination shall be, and have the effect of, a new and original classification *even though the registrant is again placed in the class that he was in before the case was reopened.*” (Emphasis supplied.)

The bill of exceptions shows that at the conclusion of the Government’s case it offered evidence, uncontradicted in the transcript of the entire case, that such an application was entertained in a formal proceeding by the board entitled

“Proceedings Before the Local Board of
Yavapai County, June 20, 1941

Present: Alfred B. Carr, Chairman, Lauren V. Seares, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.

Order No. 217

In the Matter of the Application of

ROBERT EARL HOPPER, JR.

for Classification as a Minister of Religion, and his Application for Extension of Time within which to Appeal the Decision of the Local Board of Yavapai County.”

In that proceeding Hopper suffered from the want of counsel, denied him by the regulations, and he and the witnesses he offered made a poor showing. It well could have warranted his “being *again* placed” in IV-E “the class that he was in *before*” the application was coonsidered. While the rule gave him the right to appeal it could be argued that it would have been of no avail. Quite likely the board was not aware of the change in the regulation by the Executive Order of three weeks before and hence failed to reclassify.

That, however, is entirely outside the question whether we, in effect, shall send an innocent man to prison by affirming a wrongful conviction. The fact is that he had been unclassified and was not shown to be reclassified “again” and “anew.”

On the Government's showing, on June 22, 1941, when Hopper failed to report, he was not in any class on which a "duty" under 50 U. S. C. A. 311 could be created requiring him to respond to any board's order and hence that failure constituted no crime. The judgment should be reversed.

[Endorsed]: Opinion, Concurring Opinion, and Dissenting Opinion. Filed Dec. 6, 1943. Paul P. O'Brien, Clerk .

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10110

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the District of Arizona

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judg-

ment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Dec. 6, 1943.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January
18, 1944.

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION
FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed January 5, 1944, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

It Is Further Ordered that the issuance of the mandate of this Court in above cause be, and hereby is stayed to and including February 18, 1944, and in the event the appellant shall file with the Clerk of the Supreme Court of the United States on or before said date his petition for writ of certiorari then the mandate of this court is to be stayed until after disposition by the said Supreme Court of the United States of the petition for writ of certiorari.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred forty-one (141) pages, numbered from and including 1 to and including 141, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of February, 1944.

[Seal]

PAUL P. O'BRIEN,
Clerk.